TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 261.

THOMAS P. KENNARD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 1, 1901.

(18,065.)

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INDEX.

	Original.	Print.
Caption	a	1
Petition in error	1	1
Waiver of summons in error	4	3
Motion to advance	5	3
Order granting motion to advance	5	4
Judgment	6	4
Opinion	7	4
Motion for rehearing	14	8
Order granting rehearing	15	9
Amendment to petition in error	16	9
Judgment on rehearing	17	10
Opinion on rehearing	19	11
Judgment of affirmance	27	15
Clerk's certificate	27	15
Transcript from district court of Lancaster county, Nebraska	28	15
Petition	28	16
Exhibit A—Joint resolution of February 8, 1873	31	18
B—Appointment of Kennard, October 15, 1874	31	19
C—Report of committee, March 26, 1897	32	20
Demurrer	33	20
Order overruling demurrer	33	21
Answer	34	21
Judgment	36	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1901.

error to the introduction of any evidence in said cause for the reason that the court has no jurisdiction over the subject-matter and no right to hear and determine the questions in controversy in said cause.

4. The court erred in overruling the defendant's objection to the introduction of any testimony in said cause for the reason that under the constitution and laws of the State of Nebraska all claims against the treasury must first be presented to the auditor of public accounts for audit and adjustment, and if the same be disallowed by him in whole or in part, the party presenting the claim must appeal therefrom and it did not appear from the petition in this cause that this claim had ever been presented to said auditor for audit and approval.

5. The court erred in overruling the defendant's objection to the introduction of any evidence for the reason that the petition of the plaintiff showed on its face that the claim or account of the plaintiff, if he ever had any was barred by the statutes of limitation.

6. The court erred in overruling the defendant's objection to the introduction of any testimony for the reason that the plain-
3 tiff's petition did not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.

7. The court erred in rendering judgment against the defendant and in favor of the plaintiff for the reason that said court was without jurisdiction to hear and determine said action, the defendant in error never having presented his claim to the auditor for audit and allowance.

8. The court erred in rendering judgment against this plaintiff in error and in favor of this defendant in error for the reason that it affirmatively appears from the petition filed in the district court of Lancaster county, and from the evidence in said cause that said claim did not, nor did any part thereof accrue within five years immediately preceding the filing of said petition in said court, and said claim was barred by the statute of limitations.

9. The court erred in rendering judgment against this plaintiff in error and in favor of this defendant in error for the reason that the petition filed in the district court of Lancaster county by said defendant in error does not state facts sufficient to constitute a cause of action.

10. The court erred in holding that it had jurisdiction of the subject-matter of said action, and erred in overruling the objection of the plaintiff in error to such jurisdiction.

11. The court erred in holding that said court has jurisdiction of the subject-matter of said action, when it affirmatively appeared that the defendant in error had never presented said claim to the auditor of public accounts for audit and allowance.

12. The court erred in holding that said claim was not barred by the statute of limitations.

13. The court erred in holding that said petition of said
4 defendant in error stated a cause of action.

14. The court erred in holding that under the pleadings

and evidence the defendant in error was entitled to judgment against the plaintiff in error.

15. The court erred in not rendering judgment in favor of the plaintiff in error and ag-ist the defendant in error.

16. The court erred in rendering judgment for the defendant in error on the pleadings and the evidence.

17. The court erred in not rendering judgment for the plaintiff in error on the pleadings and the evidence.

18. The court erred in overruling the motion for a new trial filed by the plaintiff in error.

Wherefore this plaintiff in error prays that said judgment may be reversed and a new trial granted in said cause, and for such other and further relief as justice may require.

C. J. SMYTH,
Attorney General,
E. P. SMITH, *Deputy,*
For Plaintiff in Error.

The defendant in error by his attorneys hereby waives the issuance and service of summons in error in this cause, and hereby enters his voluntary appearance in this court, waiving the statutory time in which to appear and file briefs and hereby consents and requests that said cause be placed upon the docket for hearing at the first sitting of the September, 1898, term of this court.

TIBBETTS BROS.,
MOREY & FERRIS,
Attorneys for Defendant in Error.

Endorsed: 10322. The State of Nebraska *v.* Thomas P. Kennard. Petition in error and waiver. Supreme court of Nebraska. Filed Sept. 2, 1898. D. A. Campbell, clerk.

5 In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA, Plaintiff in Error,
vs.
THOMAS P. KENNARD, Defendant in Error. } Motion to Advance.

Comes now the plaintiff in error, The State of Nebraska, and states to the court that the above-entled action is one of public interest involving the revenues of the State and is greatly to the interest of the State of Nebraska that said cause be set down for immediate hearing and be disposed of without delay.

Counsel for the State of Nebraska therefore move that this cause be advanced upon the docket of this court and set down for immediate consideration.

C. J. SMYTH,
Attorney General,
ED. P. SMITH, *Deputy,*
For Plaintiff in Error.

The defendant in error hereby accepts service of the foregoing motion, and consents that the same be set down for immediate hearing and determination.

TIBBETS BROS.
MOREY & FERRIS.

Endorsed: 10322. State *v.* Kennard. Motion to advance and notice. Supreme court of Nebraska. Filed Sept. 2, 1898. D. A. Campbell, clerk.

And afterwards to wit: on the 20th day of September, 1898, there was rendered by said court and entered of record a certain order in words and figures following to wit:

THE STATE OF NEBRASKA, Plaintiff in Error,
vs.
THOMAS P. KENNARD, Defendant in Error.
} Error from the District Court of Lancaster County. No. 10322.

6 This cause came on to be heard upon a motion to advance this cause for hearing, on due consideration whereof, it is by the court ordered that said motion be, and the same hereby is sustained and said cause advanced for hearing.

And afterwards to wit: on the 5th day of October, 1898 there was rendered by said court and entered of record a certain judgment in words and figures following to wit:—

THE STATE OF NEBRASKA, Plaintiff in Error,
vs.
THOMAS P. KENNARD, Defendant in Error.
} Error from the District Court of Lancaster County. No. 10322. Judgment of Reversal.

This cause came on to be heard, was taken up and argued by counsel on consideration whereof the court finds there is error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is reversed, and cause remanded for further proceedings not inconsistent with the views expressed in the opinion of this court, and that the plaintiff in error recover from the defendant in error its costs, taxed at $—; and that a mandate issue accordingly.

And on the same date to wit: on the 5th day of October, 1898, there was filed in the office of the clerk of said court a certain opinion in words and figures following to wit:—

7 STATE OF NEBRASKA
v.
THOMAS P. KENNARD.
} No. 10322. Opinion Filed Oct. 5, 1898.

The facts in this case examined and held to show that the allowance of the claim of defendant in error against the State was *in-*

proper because of the fact that in the joint resolution of the legislature under which defendant in error was employed as agent there was an inhibition of the employment of an agent to collect the five per cent. cash school fund accruing to the State.

8 STATE OF NEBRASKA v. THOMAS P. KENNARD. } No. 10322.

Filed October 5, 1898.

RYAN, C.:

This action was begun in the district court of Lancaster county under the sanction of a resolution of the house of representatives of the legislature of 1895 permitting the institution of such a suit against the State, and there was a judgment for the sum of $13,521.99, for the reversal of which these proceedings are prosecuted by the judgment defendant. There were several matters urged by way of defense, in the district court, but the view which we take of the case dispenses with a consideration of other questions than those which shall now receive attention.

On February 8, 1873, there was approved the following joint resolution, which had been adopted by the legislature then in session, to wit: "Be it enacted by the legislature of the State of Nebraska:

"That the governor be, and he hereby is, authorized and empowered to appoint an agent or agents in behalf of this State to prosecute *the* final decision before Congress, or in the courts, the claim of this State for the five per cent. due to the same from the United States upon the land of this State disposed of by Indian reservations and by the location of military land warrants and land scrip issued for military service in the wars of the United States and for agricultural college scrip and railroad lands; and

"Whereas, the Government of the United States has allowed various States large amounts of swamp and overflowed lands
9 lying within their borders; and

"Whereas, no such allowance of swamp and overflowed land has ever been received by this State for the large area of land lying within its limits subject to overflow: Now, therefore,

"Be it resolved by the senate and house of representatives of the State of Nebraska, That the governor is hereby authorized and empowered to appoint a competent and reliable agent or agents as provided by section one of this act, and that said agent or agents shall receive such compensation from said lands or money as may be agreed upon by said agent or agents and the governor conditioned that the State shall be put to no expense whatever unless said agent or agents shall be successful in whole or in part in securing the aforementioned claims: Provided that the foregoing shall in nowise apply to the five per cent. cash school fund accruing to the State." (General Statutes 1873, p. 869, ch. 59.)

On October 15, 1874, Robert W. Furnas, as governor of Nebraska, entered into a written agreement with Thomas P. Kennard by the

terms of which the latter was to receive fifty per cent. of the amount to be collected by him as agent for the State of Nebraska under the terms of the joint resolution above set out. In his petition in the district court Mr. Kennard alleged that he had prosecuted the claims of the State of Nebraska for five per centum due to the State of Nebraska on account of Indian reservation lands, and in the said prosecution he had expended large sums of money, and, to quote his own language used in said petition, that he, "as a result of such prosecution, obtained from the Department of the Interior, one of the executive departments of the United States Government,
10 a decision on the 14th day of January, 1881, whereby the State of Nebraska was authorized to receive five per cent. of the proceeds of all sales of lands upon what was known as the Pawnee Indian reservation within the borders and limits of the State of Nebraska, and by such decision of the said department the State of Nebraska was awarded five per centum of said sales."

This action was for one-half of the net amount which had been received by said State from the sales of land in the Pawnee Indian reservation.

The enabling act by virtue of which Nebraska became a State contained the following provisions: "SEC. 12. And be it further enacted, That five per centum of the proceeds of the sale of all public lands lying within said State, which have been or shall be sold by the United States prior or subsequent to the admission of said State into the Union, after deducting all expenses incident to the same, shall be paid to said State for the support of common schools." (13 U. S. Statutes at Large, p. 49.) The five per cent. cash school fund accruing to the State mentioned in the proviso with which the joint resolution closed, it is claimed by the attorney general, is the five per cent. contemplated by section 12 of the enabling act, and, therefore, that no compensation was earned for collecting this because of the terms of said proviso expressly denying the right of compensation for such collection. On behalf of the defendant in error it is contended that the misapprehension which vitiates this argument of the attorney general is that the term "public lands" was not applicable to an Indian reservation. To sustain this view the defendant in error insists that the Supreme Court of the United States, in Newhall *v.* Sawyer, 92 U. S., 763,
11 defined the expression "public lands" in the following language: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The deductions which counsel for defendant in error make from these premises will probably be most correctly stated by quoting from the brief submitted by them this language: "The lands within the Pawnee reservation were never subject to sale or other disposal under general laws, and when they were finally sold it was under the provision of a special act of Congress approved April 10th, 1876, entitled 'An act to authorize the sale of the Pawnee reservation.' (See U. S. Statutes at Large, vol. 19, p. 28, ch. 51.) This act provided that these lands should be advertized for a certain time in papers in local cities and should be sold at public auction.

Had these been 'public lands,' they would have been subject to entry under the homestead and pre-emption laws, and would not have been sold at public auction. If, therefore, they were not 'public lands,' then the State of Nebraska had no claim upon them or their proceeds by virtue of section 12 of the enabling act."

We confess that this course of reasoning does not impress us as being sound or convincing. If we apprehend the propositions implied or embodied in the above language, they are, first, that these lands were not public lands, for if they had been they would have been subject to entry under the homestead and pre-emption laws; second, that the fact that they were sold at public auction after advertisement shows they were disposed of under a special act of Congress, and, consequently, third, it is inferred that they were not "subject to sale or other disposal under general laws." As to the inference just stated, it is sufficient to say that the mere
12 fact that Congress, by a special act, prescribed how these lands should be sold does not justify the inference that they could not have been sold in any other manner. Counsel for defendant in error have not in their brief or argument cited any authority or statutory provision which tends to sustain the general proposition above laid down that the lands within the Pawnee reservation were never subject to sale or other disposal under general laws, and we cannot accept this unsupported statement as correct. In the letter of the Commissioner of the United States Land Office, addressed to Mr. Kennard, of date January 14, 1881, referred to in the petition, and which Mr. Kennard offered in evidence, the right of the State of Nebraska to an accounting was recognized under the provisions of section 12 of the enabling act, because of the fact that the lands sold were public lands. Counsel for the defendant in error, however, in their brief, repudiate this theory and state the right to compensation as follows:

"The facts may be stated thus: The State claimed that the five per cent. provision in the enabling act gave it some kind of a claim against these reservation lands. The United States denied it. The State employed Mr. Kennard to convince the United States that it was wrong. Mr. Kennard succeeded in doing so, and recovered over $27,000. The State accepted the money, but the attorney general would now refuse Mr. Kennard any compensation on the ground that the money belonged to the State all the while." If we understand this language, we are asked to infer that the claim prosecuted by Mr. Kennard was not one on which the State was entitled to recover payment, but that Mr. Kennard made a showing so plausible that it was paid; therefore, he should recover half of that payment. Mr. Kennard is prosecuting this action to enforce the payment of his
13 claim as a matter of strict right under his contract. With considerations of what the State should do, independently of its contract obligations, we have no concern. If Mr. Kennard has obtained the allowance and payment to the State of that to which the State was not entitled, the legislature must determine how his services should be recognized. Upon the record and evidence submitted for our consideration we see no room for doubt that to enforce

the claim of Mr. Kennard to a division of the five per cent. of the proceeds of sales of lands constituting the Pawnee Indian reservation would be in contravention of the proviso of the joint resolution by which it was declared that the employment of a collecting agent should in nowise apply to the five per cent. cash school fund accruing to the State. The judgment of the district court is, therefore, reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

14 And afterwards to wit: on the 29th day of October 1898 there was filed in the office of the clerk of said court a certain motion in words and figures following to wit:—

In the Supreme Court of the State of Nebraska.

THE STATE OF NEBRASKA, Plaintiff in Error,
vs.
THOMAS P. KENNARD, Defendant in Error. } Motion for Rehearing.

The defendant in error, Thomas P. Kennard, moves the court for a rehearing of this case for the following reasons, to wit:—

1. The opinion of the case is not in accord with the facts as shown by the record, and especially upon pages 49 and 50 bill of exceptions.

2. The court erred in holding that the Pawnee Indian Reservation lands, concerning which defendant in error performed the services for plaintiff in error, were public lands.

3. The contract between the defendant in error and the plaintiff in error, as shown by the record, clearly shows that the intent of the parties to the contract was to include compensation for the services actually rendered by plaintiff below, and for which compensation the defendant in error brings this action.

4. The court in its opinion fails to construe the contract between plaintiff in error and defendant in error with reference to the subject-matter of this suit as to the intent of the parties to the contract.

15 5. The point upon which this decision is based was not at issue under the pleadings.

6. The point upon which this decision is based was not presented in the petition in error.

7. The facts of the case, as shown by the record, show that the moneys received by the State, the obtaining of which the defendant in error claims compensation were not a part of the five per cent. of the cash school fund accruing to the State within the meaning of the proviso of the legislative resolution, which authorized the employment of defendant in error.

8. The defendant in error contends the law should be that the Pawnee Indian Reservation lands involved in this controversy, never were public lands, and were never owned by the United

States, and that the United States never had any interest in said lands after September 4th 1857, except as trustee for the Indians.

TIBBETTS BROS.,
MOREY & FERRIS,
TALBOT & ALLEN,
Attorneys for Def't in Error.

Endorsed: 10322. In the supreme court of the State of Nebraska. The State of Nebraska, plaintiff in error, Thomas P. Kennard defendant in error. Motion for rehearing. Supreme court of Nebraska. Filed October 29 1898. D. A. Campbell, clerk.

And afterwards to wit: on the 8th day of December 1898 there was rendered by said court and entered of record a certain order in words and figures following to wit:

STATE OF NEBRASKA, Plaintiff in Error, vs. THOMAS P. KENNARD, Defendant in Error.	Error from the District Court of Lancaster County. No. 10322.

16 This cause came on to be heard upon a motion by the defendant in error for a rehearing, on consideration whereof it is by the court ordered that said motion be and the same hereby is sustained, and a rehearing allowed; counsel to argue such points as they choose, but the court desires to hear council on the points wh-ther Kennard can recover without showing that he procured for the State, money by virtue of an act of Congress, or a judgment or decree of the courts.

And afterwards to wit: on the 19th day of February, 1899, there was filed in office of the clerk of said court a certain amendment to the petition in words and figures following to wit:

In the Supreme Court of the State of Nebraska.

STATE OF NEBRASKA, Plaintiff in Error, v. THOMAS P. KENNARD, Defendant in Error.	Amendment to Petition in Error.

Now comes the plaintiff in error in above-entitled case and adhering to all the assignments of error made in its original petition in error, and having obtained permission of the court, files this, its amendment to the said original petition in error, and alleges that in addition to the errors already alleged in said original petition in error, there was and is error in the proceedings and judgment, more particularly described in said original petition in error in this:—

1. The finding of the court for the plaintiffs is not sustained by sufficient evidence.

2. The finding of the court that there is due the plaintiff before

the cause of action set forth in the petition, the sum of
17 $13,521.99 is not sustained by sufficient evidence.

3. The finding of the court that the plaintiff below was entitled to judgment against the defendant below is not sustained by sufficient evidence. The judgment of the court below is not sustained by sufficient evidence.

4. The finding of the court below in favor of the plaintiff below is contrary to law. The finding of the trial court that there is due the plaintiff below the sum of $13,521.99 with interest thereon is contrary to law.

5. The finding that the plaintiff below is entitled to judgment against the defendant below is contrary to law. The judgment of the court below in favor of the plaintiff and against the defendant is contrary to law.

6. The court below erred in finding the defendant in error had a right to recover anything in the contract set out in this case.

Wherefore, plaintiff in error prays as he prayed in his original petition in error.

THE STATE OF NEBRASKA,
By C. J. SMYTH, *Attorney General.*

And afterwards to wit: on the 9th day of Fe-ruary 1899 there was rendered by said court and entered of record a certain — in words and figures following to wit:—

STATE OF NEBRASKA, Plaintiff in Error, *vs.* THOMAS P. KENNARD, Defendant in Error.	Error from the District Court of Lancaster County. No. 10322. Judgment of Reversal.

This cause came on to be heard, was taken up and argued by counsel on consideration whereof the court finds there is
18 error apparent in the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be and the same hereby is reversed, and the cause remanded for further proceedings; and that the plaintiff in error recover of the defendant in error its costs taxed at $— and that a mandate issue accordingly.

And on the same date to wit: on the 9th day of February 1899 there was filed in the office of the clerk of said court a certain opinion in words and figures following to wit:—

19

STATE OF NEBRASKA
v.
THOMAS P. KENNARD. } No. 10322.

Opinion Filed February 9, 1899.

Syllabus.

1. At the time of the admission into the Union of the State of Nebraska the lands therein occupied in common by the Pawnee Indians and known as the "Pawnee Indian reservation" were public lands within the meaning of section 12 of the act of Congress known as the enabling act (13 U. S. Statutes at Large 47).
2. The fee-simple title to said lands at said time was in the United States encumbered only with the right of said Indians to occupy the same.
3. By section 12 of said enabling act Congress granted to the State of Nebraska five per cent. of the proceeds arising from the sale of said lands which took effect upon the extinguishment of the Indians' right of occupancy and the sale of the lands by the United States.
4. State *v.* Kennard 55 Neb. — reaffirmed.

20

STATE
v.
KENNARD. } No. 10322.

Filed Feb'y 9, 1899.

RAGAN, *C.:*

This is a rehearing of State *v.* Kennard, 56 Neb. 254. By section 12 of the enabling act passed by Congress April 19, 1864 (13 U. S. Statutes at Large, 47), the United States donated to the State of Nebraska five per centum of the proceeds of sale of all public lands lying within the State of Nebraska which had prior to that time been sold, or which s-ould subsequently be sold, by the United States, after deducting expenses incident to such sale. At the time the State was admitted into the Union a tribe of Indians known as the "Pawnees" occupied in common a tract of lands in this State known as the "Pawnee Indian reservation." After the State was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States Treasury to the credit of the Indians. By an act passed by the legislature of the State of Nebraska in February, 1873 (see General Statutes 1873, ch. 59), it seems that the legislature was of opinion that by reason of section 12 of the enabling act the United States was indebted to it for five per cent. of the value of the lands lying within the State used as Indian

reservations, and five per cent. of the value of all lands on
21 which private parties had located military land warrants and land scrip issued for military service in the wars of the United States, and five per cent. of the value of all such as had been donated by the United States to railroads.

It is also recited in said act that the United States had donated to other States swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this State, and it seems to have been the opinion of the legislature that all the swamp and overflowed lands lying within the State belonging to the United States should by it be donated to the State. The act under consideration authorized the governor to employ an agent in behalf of the State, to prosecute to final decision before Congress or in the courts the claim of the State of Nebraska against the United States for the five per cent. of the value of the lands disposed of by the United States for any of the purposes already mentioned and for the purpose of procuring from the United States a donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the five per cent. cash school fund which had been donated to the State by the United States by section 12 of the enabling act aforesaid. The governor of the State entered into a contract with Kennard in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the State against the nation in conformity with the act of the legislature, and that the State should pay him one-half of all moneys, except such cash school fund, he should collect for the State as such agent. Mr. Kennard entered upon the performance of his con-
22 tract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the State of Nebraska in the sum of five per centum of the proceeds of the sale of the "Pawnee Indian Reservation" lands made by the United States subsequent to the admission of the State into the Union; and in pursuance of this decision of the Secretary of the Interior the United States paid into the treasury of this State $27,000. Mr. Kennard, by permission of the legislature, then brought this suit to recover one-half of that sum. He had judgment in the district court for Lancaster county and the State brought the same here for review, and the judgment of the district court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the "Pawnee Indian reservation" were public lands within the meaning of section 12 of the enabling act, and that the only money collected by Mr. Kennard was the five per cent. of the proceeds of the sale made of these lands by the United States, and by the terms of his contract he was not to have any compensation for collecting these moneys.

Counsel for Mr. Kennard so strenuously insisted that we were wrong in this conclusion that we granted a rehearing. We have

again examined the question, with the result that we adhere to our former conclusion. In 1873 the Great and Little Osage Indian tribes occupied certain lands in common in the State — Kansas. The lands occupied by them were known as Indian reservations. In that year Congress passed an act (see 12 U. S. Statutes at Large 772) in and by which it granted to the State of Kansas, to enable a railroad to be constructed between certain points, each alternate section of land, designated by odd numbers, for ten section- in width on each
23 side of said railroad as it should be located. The legislature of the State of Kansas accepted this grant and designated the Leavenworth, Lawrence & Galveston Railroad Company to construct the road and receive the grant of land. The railroad company constructed the road and received from the State of Kansas patents for the alternate sections of this land within these Indian reservations. The United States then brought ejectment against the railway company for the lands lying within the Indian reservations which had been conveyed to the railroad company by the State of Kansas, and the supreme court, by a divided opinion, held that the act of Congress granting to the State of Kansas the alternate sections of land within ten sections of this railroad did not vest the State of Kansas with any lands within the Indian reservation. It was conceded that the fee-simple title to the Indian Reservation lands was in the United States and that the only title of the Indian was the right to occupy, and because the United States were not invested with possession and the right to possession as well as the fee the court held that the grant did not embrace the lands within the reservations. The principle upon which the case was decided was that all grants are to be strictly construed against the grantee; that nothing passes except what is conveyed in clear and explicit language; and that, strictly coustruing the act of Congress, it would not be held that the United States intended to convey what it did not own, namely, both title and seisin. (Leavenworth, L. & G. R. Co. *v.* United States, 92 U. S. 753.) This conclusion of the court was reached notwithstanding the fact that on the same day the act donating these lands to the State of Kansas passed another act of Congress went into effect authorizing the President, by treaty or otherwise, to extinguish the rights of these Osage Indians to the
24 lands in their reservation, and that subsequently the title of these Indians to these lands was extinguished, the lands put upon the market and sold by the United States, and the proceeds placed in the United States Treasury to the credit of the Indians. In 1864 certain tribes or bands of Sioux Indians occupied in common certain lands in what was then known as Dakota Territory, and by an act of Congress passed in July of that year (13 U. S. Statutes at Large 365) Congress granted to the Northern Pacific Railway Company each alternate section of public lands not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of its line of railway as the same was to be constructed between Lake Superior and Puget sound. The railroad, as constructed, passed through the lands occupied by these Sioux Indians, and it claimed that the act of Congress vested in it

the title to these alternate sections of land lying within these Sioux reservations. On the other hand, it was contended that at the time the grant to the Northern Pacific went into effect the United States were not in possession of both the fee title and the possession and right to possession of these Indian lands; that the grant should be strictly construed, and that the act could not be interpreted to mean that the United States granted the railroad company what it did not own, and the case in 92 U. S. just referred to was relied upon to support that contention. But the national Supreme Court held that by the act of Congress the United States donated to the railroad company all the right and title which it, the United States, had in those lands. (Buttz *v.* Northern P. R. Co., 119 U. S. 55.) This Northern Pacific Railroad case virtually overruled the case in 92 U. S. The doctrine then of the Supreme Court of the United States is that all Indian lands, all lands occupied in common by the
25 Indians, whether these lands be reservations or not are public lands, the fee-simple title to which is in the United States; that the Indian is but the ward of the nation and his only interest or title to the lands of which he is in possession is the right to occupy. We think, therefore, that when Nebraska was admitted into the Union the lands of the "Pawnee Indian reservation" were public lands, the fee-simple title was in the United States, and the Indians had only the right of occupancy in those lands, and that an absolute grant by Congress to the State of all public lands within her borders would have invested the State with the title to the lands of the "Pawnee Indian reservation," incumbered only with the Indians' rights of occupancy. The United States then, by paying into the State treasury, at the request and solicitation of Mr. Kennard, of five per cent. of the sale of these Indian reservation lands, were simply performing the grant made by the nation to the State by section 12 of the enabling act, as by the grant the United States promised to pay to the State not only five per cent. of the proceeds of all public lands lying within the State and which had prior to that time been sold by the United States, but also to pay to the State five per cent. of the proceeds of all public lands lying within the State which might after the date of the grant be sold by the United States. The fact that the United States sold these lands and put the money to the credit of the Pawnee Indians is not a consideration of any importance in determining whether these "Pawnee Indian Reservation" lands were public lands within the meaning of the enabling act. The thing of controlling importance is that the fee-simple title to these lands was in the United States. They were, therefore, public lands, and the promise was that when sold by the owner
26 it would pay five per cent. of the proceeds of the sale to the State. What the United States did with the money derived from the sale of those lands is unimportant. The judgment of the district court is reversed.

27 THOMAS P. KENNARD, Appellant, *vs.* THE STATE OF NEBRASKA, Appellee. } Appeal from the District Court of Lancaster County. No. 11125. Judgment of Affirmance.

This cause came on to be heard upon the record, on consideration whereof the court finds there is no error apparent on said record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be and the same hereby is affirmed; that the defendant in error recover of the plaintiff in error its costs taxed at $— and that a mandate issue accordingly.

STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the case of The State of Nebraska *v.* Thomas P. Kennard, as fully as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court at the city of Lincoln this 14th day of January, A. D. 1901.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN,
Clerk Supreme Court.

Clerk's fees for transcript $11.70.

28 21–27.

TRANSCRIPT.

Pleas.

In the district court of the third judicial district of Nebraska, in and for the county of Lancaster, at the September A. D. 1899 — began and held in the city of Lincoln, in said county and State, on the 5th day of September in the year of — Lord one thousand eight hundred and ninety-nine and on a day therein to wit: on the 7th day of October A. D. 1899 (that being the 27th judicial day of the September, A. D. 1899, term of said court) present, Hon. A. J. Cornish, judge, presiding; John J. Trompen, sheriff; C. O. Boettcher, clerk; the following proceedings were had and done to wit:

Be it remembered that at the several times hereinafter set forth, were filed in the office of the clerk of said court papers of which the following are true and correct copies and proceedings were had and done in the cause below named as follows:

Petition.

In the District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Petition.

The plaintiff for cause of action states:

1st. That on the 8th day of February 1873 the legislature of the State of Nebraska, passed a joint resolution wherein and whereby it authorized and empowered the governor of the State of Nebraska to appoint an agent to act in behalf of the State to prosecute to final decision before Congress or in the courts or government departments a claim by the State of Nebraska, for five per cent. due to the said State from the United States upon lands within the borders of the State disposed of by the United States by way of Indian reservations and further empowered the said governor to contract with said agent for such compensation from said lands or money recovered by means of such prosecution as might be agreed upon between said agent and the said governor; such joint resolution being on the 8th day of February 1873 duly approved by the governor of the State of Nebraska. A copy of said resolution is hereto annexed marked Exhibit "A" and made a part of this petition.

2nd. Plaintiff further states that in pursuance of the *the* 29 power conferred upon said governor by said joint resolution and by virtue of the same on the 15th day of October 1874 Robert W. Furnas as governor of the State of Nebraska and acting in behalf of the State of Nebraska, entered into a written contract with this plaintiff whereby it was agreed that this plaintiff should act as agent of the State of Nebraska, in prosecuting the claims of the State for moneys or lands — to it from the United States by reason of lands being disposed of to Indian reservation within the borders of the State and in said contract it was agreed that in consideration of said service for such prosecution and in consideration of the moneys expended as expenses of said prosecutions the said Thomas P. Kennard should receive from the State of Nebraska fifty per centum of the total amount collected through such prosecutions the remainder to be paid over to Robert W. Furnas governor of the State of Nebraska or his successors in office. A copy of said contract is hereto annexed marked Exhibit "B" and made a part of this petition.

3rd. Plaintiff further states that in pursuance of said contract and by virtue of his employment as agent of the State of Nebraska he prosecuted the said claims of the State of Nebraska, for five per centum due the State of Nebraska on account of Indian reservation lands appropriated by Indian reservations within the borders of the State of Nebraska, and in the course of such prosecution expended a large amount of time and performed a large amount of services and expended a large amount of money, to wit: the sum of about *$3400.0.00* and as a result of such prosecution obtained from the De-

partment of the Interior one of the executive departments of the United States Government a decision on the 14th day of January 1881 whereby the State of Nebraska, was authorized to receive five per cent. of the proceeds of all sales of lands upon what was known as the Pawnee Indian reservation within the borders and limits of the State of Nebraska, and by such decision of the said department the State of Nebraska was awarded five per centum of said sales.

4th. Plaintiff further states that under said decision and by virtue and reason of the efforts of this plaintiff acting through and by virtue of his employment as agent of the State of Nebraska, and under the contract heretofore set forth there accrued to the State of Nebraska, five per centum of the sales of the said lands of the Pawnee Indian reservation between June 1st 1878 and June 30th 1879, the sum of $1,993.87 which was paid to the State of Nebraska, on the 17th day of January 1882; that there further accrued to the State of Nebraska under such decision by virtue of the sales of lands of the said reservation from July 1st 1879 to June 30th, 1880, the further and additional sum of $4,281.60, which was paid to the State of Nebraska on the 21st day of August 1882; that there further accrued to the State of Nebraska through the sales of lands of such Indian reservations under the said decision from July 1st 1880 to June 30th 1881 the further sum of $3,272.57 which was paid to the State of Nebraska on the 11th day of September 1886; that there further accrued to the State of Nebraska from the sales of said lands under said decision from the 1st day of July 1881 to the 30th day of June 1883 the further and additional sum of $17,495.95 which was paid to the State of Nebraska on the 11th day of June 1884; that the total amount so accruing to the State of Nebraska and paid over to the said State as proceeds from the sales of lands of the Pawnee Indian reservation and arising through and by virtue of the decision above referred to was $27,043.99 all of which sum entered into the treasurery of the State of Nebraska and has ever since said payments remained in the possession and control of the State of Nebraska, and this plaintiff has never at any time received any part thereof, and there is now due and payable from the defendant The State of Nebraska to this plaintiff fifty per centum (50 %) of said sum to wit; the sum of $13,521.99.

5th. Plaintiff further states that on the — day of January 1897 the plaintiff caused to be filed with the legislature of the State of Nebraska, in the general appropriation bill, a claim against the State of Nebraska for the moneys due him through and by virtue of said employment; that said claim so filed was referred to the house committe- on claims and on the 26th day of March 1897 the said committe made its report to the said house and the said house adopted a resolution referring the said claim to the courts of this State for adjudication of its validity and the amount if any due thereon. Said resolution and report of committe- being hereto annexed marked Exhibit "C" and made a part of this petition; and by virtue thereof the plaintiff is authorized to prosecute the said claim in the courts of the State of Nebraska.

6th. Plaintiff further alleges that the said claim is not such a

claim as could have been presented to the auditor of the State of Nebraska, for his examination and approval and that at no time has any appropriation ever been made for the payment of this claim and at no time has there ever been any fund of the State of Nebraska upon which plaintiff could claim payment.

7th. Plaintiff further states that by reason of the facts heretofore set forth the defendant is indebted to plaintiff in the sum of $13,521.99 for which plaintiff asks judgment and adjudication of the amount; that the same is a just and proper claim and costs of action.

THOMAS P. KENNARD,
By TIBETS BROS.,
MOREY & FERRIS,
His Attorneys.

STATE OF NEBRASKA, }
Lancaster County, } ss:

Thomas P. Kennard being first duly sworn deposes and says that he is the plaintiff herein that he has read the above and foregoing petition knows the contents thereof and verily believes the same to be true.

THOMAS P. KENNARD.

Subscribed in my presence and sworn to before me this 29th day of May A. D. 1897.

[SEAL.]

D. A. HAGGARD,
Notary Public.

31

EXHIBIT "A."

Joint resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska on account of lands in this State disposed of by Indian reservation military land warrants and land script issued for military services in the wars of the United States for agriculture college scrip, and for the recovery of swamp and overflowed lands due the State.

(Passed and took effect February 8, 1873.)

Be it enacted by the legislature of the State of Nebraska

(28.) That the governor be, and he hereby is authorized and empowered to appoint an agent or agents in behalf of this State — the claim of this State for the five per cent. due to the same from the United States upon the land of this State disposed of by Indian reservations and by the location of military land warrants and land scrip issued for military service in the wars of the United States and for agriculture college scrip, and railroad lands; and

Whereas, the Government of the United States has allowed various States large amounts of swamp and overflowed lands lying within their borders and;

Whereas, no such allowance of swamp and overflowed land has ever been received by this State for the large area of land lying within the limits subject to overflow; now therefore,

Be it resolved by the senate and house of representatives of the State of Nebraska, That the governor is hereby authorized and empowered to appoint a competent and reliable agent or agents as provided in section one of this act and that said agent of agents shall receive such compensation from said lands or money as may be agreed upon by said agent or agents and the governor conditioned that the State shall be put to no expense whatever, unless said agent or agents shall be successful in whole or in part in securing the aforementioned claims; provided that the foregoing shall be nowise apply to the five per cent. cash school fund accruing to the State.

Approved, February 8th 1873.

EXHIBIT "B."

STATE OF NEBRASKA, EXECUTIVE DEPARTMENT,
LINCOLN, *October* 15, 1874.

That whereas the legislature of the State of Nebraska, passed a joint resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska, on account of lands in this State disposed of by the Indian reservations, military land warrants and land scrip issued for military services in the wars of the United States for agriculture college scrip and for the recovery of swamp and overflowed lands due the State approved February 8, 1873, a certified copy of which is hereto attached and made a part of this agreement;

32 Now therefore in pursuance of the object and intent of said joint resolution and by the power and authority vested in me by the same, I, Robert W. Furnas, governor of the State of Nebraska, do by these presents appoint as agent, Thomas P. Kennard and with him stipulate as follows; in consideration that the said Thomas P. Kennard shall diligently and to the best of his ability prosecute and collect the claims specified in said joint resolution and upon the terms therein specified and contemplated, he, the said Thomas P. Kennard shall have and be entitled to receiver for his services in the premises fifty per cent. of the amount so collected, the remaining fifty per cent. (50) upon the amount so collected to be paid over to the said Robert W. Furnas governor of Nebraska or his successor in office for the use and benefit of the State of Nebraska, as by law in such cases made and provided.

Provided that it is hereby distinctly understood and agreed that no charge shall be made to the State for any expenses or services of whatever kind or nature in case of failure to collect money or lands contemplated in the joint resolution authorizing this contract; to all of which the contracting parties agree as witness their respective signatures the day and year above written.

[STATE SEAL.] ROBERT W. FURNAS,
Governor of Nebraska.
THOMAS P. KENNARD.

In presence of—
J. H. ALFORD.

EXHIBIT "B."

Introduced by the house committee on claims.

March 26th, 1897 (sixty-second day).

In the Matter of the Claim of THOMAS C. KENNARD for Services Alleged to Have Been Rendered under an Agreement Made with Governor Rob't W. Furnas in the Year A. D. 1874.

Your committee would report as follows:

Resolved that the claim of Thomas P. Kennard for $15,659.18 for services alleged to have been rendered to the State of Nebraska, in obtaining the allowance from the United States to the State of Nebraska of five per cent. of the proceeds of certain lands lying within the State of Nebraska be in accordance with the provisions of section 1106 of the Code of Civil Procedure of this State referred to the courts of this State for adjudication of the validity of said claim and the amount if any due thereon.

E. SODERMAN, *Chariman.*

The report was adopted.

EXHIBIT "C."

Endorsed: In the district court of Lancaster county, Nebraska—Thomas P. Kennard plaintiff—*vs.*—The State of Nebraska defendant—Petition—Clerk's office district court. Filed May 29, 1897. Sam. E. Low, clerk district court.

33

Demurrer.

In the District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Demurrer.

Comes now The State of Nebraska, defendant herein and demurs to the petition filed by the plaintiff for the following reasons to wit:

1. The facts stated in plaintiff's petition are not sufficient to constitute a cause of action against this defendant.

2. Plaintiff's petition shows on its face that his cause of action if any existed is barred by the statute of limitation.

C. J. SMYTH, *Att'y Gen.*,
ED. P. SMITH, *Deputy,*
Att'ys for Defendants.

Endorsed: In the district court of Lancaster county Nebraska—Thomas P. Kennard, plaintiff—*vs.*—The State of Nebraska, defendant—Demurrer—Clerk's office district court. Filed Sep. 13, 1897. Sam. E. Low, clerk district court.

Journal Entry.

That on the 15th day of December A. D. 1897 (that being the sixtieth judicial day of the September A. D. 1897 term of said court) were had and done the following proceedings as appears upon Court Journal "28" at page "498" to wit:

THOMAS P. KENNARD
vs.
THE STATE OF NEBRASKA. } *ss:*

This cause now comes on to be heard upon the demurrer of the defendant to the petition herein and the same having been heretofore argued and submitted to the court now comes on for final determination, and after due consideration and being fully advised in the premises the court doth overrule said demurrer to which the defendant duly excepts.

34 *Answer.*

In the District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Answer.

Comes now The State of Nebraska, defendant herein and for answer to the petition of the plaintiff states:

I.

The defendant denies the jurisdiction of this court over the subject-matter of this suit and states that said court has no jurisdiction to hear and determine the questions in controversy in this case, and no right to hear and determine the matters in dispute between the plaintiff and this defendant. This defendant denies the jurisdiction of this court over the subject-matter of this action and also denies that this court has jurisdiction over the person of the defendant or any right to compel the defendant to make answer to the allegation in said plaintiff's petition contained.

II.

Further answering said petition and without waiving any of the matters or objections heretofore urged in this answer but at all times insisting that said court is without jurisdiction to hear and determine said case, this defendant subject to said objection states that said action should be dismissed for the reason that the facts stated in the plaintiff's petition do not constitute a cause of action against this defendant.

III.

Further answering said petition and without waiving any of the foregoing objections but, at all times insisting thereon this defend-

ant admits the allegations of the first paragraph of said plaintiff's petition; and that the legislature passed the resolution as set forth in Exhibit "A" attached to said petition; and that the plaintiff and the governor of Nebraska, executed a contract as set forth in Exhibit "B" attached to said petition.

IV.

Defendant denies each and every allegation contained in the third and fourth paragraphs of said plaintiff's petition.

V.

Defendant admits that the plaintiff caused to be filed with the legislature of the State of Nebraska in the year 1897 a claim against said State of Nebraska; that said claim was refer-ed to the committee on claims and that said committee on claims reported the resolution marked Exhibit "C" and made a part of the plaintiff's petition; and that the resolution was adopted by the said house as stated in said petition. Further than this defendant denies each and every allegation in said plaintiff's petition contained.

This defendant further answering al-eges that the said pretended claim of the plaintiff did not nor did any part thereof accrue within *within* two years or ten years immediately preceding the filing of the petition in this case and that said pretended claim of the plaintiff is barred by the statute of limitations.

VI.

Further answering said petition defendant alleges that by the constitution and laws of the State of Nebraska, all persons having claims against the State of Nebraska, are required to present the same to the auditor of the State of Nebraska for audit and approval and that no right exists on the part of the plaintiff to invoke the powers or jurisdiction of this court to adjudicate the validity of his claim unless the same has been first presented to said auditor for audit and approval and has been by said auditor rejected in whole or in part. Defendant alleges that the plaintiff has at no time presented said claim to the auditor of public accounts of the State of Nebraska, for audit and approval; nor has the same ever been rejected in whole or in part by said auditor of public accounts.

By reason whe[illegible] this court has no jurisdiction to hear or determine the matters in controversy herein.

Wherefore this defendant prays that this action may be dismissed at plaintiffs costs.

C. J. SMYTH, *Att'y Gen.*,
ED. P. SMITH, *Deputy*,
Att'ys for Def't.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Constantine J. Smyth being first duly sworn deposes and says that he is the duly elected qualified and acting attorney general of

the State of Nebraska and that the statements in the foregoing answer are true as he verily believes.

C. J. SMYTH.

Subscribed and sworn to before me this 10th day of January 1898.

[SEAL.] EDWARD J. STREIGHT,
Notary Public.

Endorsed: In the district court of Lancaster county Nebraska—Thomas P. Kennard plaintiff *vs.* State of Nebraska defendant.—Answer—Clerk's office district court Filed Jan. 10, 1898 Sam. E. Low, clerk district court.

36 *Journal Entry.*

That on the 11th day of March A. D. 1898 (that being the 28th judicial day of the February A. D. 1898 term of said court) were had and done the following proceedings as appears upon Court Journal "30" at page "265" to wit;

THOMAS P. KENNARD
vs.
THE STATE OF NEBRASKA. } 21–27.

Now on this day came the parties hereto with their attorneys and trial of this cause is now had to the court without the intervention of a jury, the same being waived by agreement of parties in open court and is submitted upon the pleadings and the evidence adduced on due consideration whereof the court finds for the plaintiff and finds that there is due the plaintiff upon the cause of action set forth in the petition herein, from the defendant the sum of $13,521.99 for which amount with interest thereon at the rate of 7 % per annum from this date together with the costs of this action, the said plaintiff is entitled to judgment.

It is therefore considered and adjudged by the court that the said plaintiff Thomas P. Kennard do have and recover of and from the defendant The State of Nebraska, the said sum of thirteen thousand five hundred twenty-one and $\frac{99}{100}$ ($13,521.99) dollars as above found due him, with interest thereon at the rate of 7 % per annum from this date until paid, together with the costs of this action taxed at $18.63.

And this cause now comes on to be heard upon the motion of the defendant to set aside the findings and judgment of the court and for a new trial herein and submitted to the court, on due consideration whereof the court doth overrule said motion, to which the said defendant duly excepts and forty days from the rising of the court are hereby given it to reduce its exceptions herein to writing.

Motion for New Trial.

District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Motion for New Trial.

37 Comes now the defendant and moves the court to set aside the finding and judgment hereinbefore entered in the above-entitled cause and grant a new trial therein for the following reasons to wit;

1. Because this court has no jurisdiction of the defendant or right to pass upon the matters disputed herein.

2. Because under the constitution and laws of the State of Nebraska, all claims against the State treasury must first be presented to the auditor of public accounts for audit and if the same be disallowed by him in whole or in part the party presenting the claim must appeal therefrom. It appears from the evidence in this case that this claim was never presented to said auditor for audit and approval.

3. The petition shows on its face and the evidence proves that the account or claim of the plaintiff if he ever had one is barred by the statute of limitations.

4. The finding and judgment of the court are contrary to law.

5. The finding and judgment of the court are not supported by sufficient evidence.

6. Because this court has no jurisdiction of the subject-matter of this action and no right to hear and determine the questions in controversy in this case.

7. The finding and judgments of the court are contrary to the evidence.

8. The court erred in overruling the defendant's objections to the introduction of any testimony.

9. Errors of law occurring at the trial duly excepted to by the defendant.

10. The court erred in receiving in evidence Exhibit "One" to which the defendant duly excepted.

11. The court erred in receiving in evidence Exhibit "Two" to which the defendant duly excepted.

12. The court erred in receiving in evidence Exhibit "Three" to which the defendant duly excepted.

13. The court erred in receiving in evidence Exhibit "Four" to which the defendant duly excepted.

14. The court erred in receiving in evidence Exhibit "Five" to which the defendant duly excepted.

Wherefore the defendant prays that the finding and judgment heretofore entered in this cause be vacated and set aside and that a new trial be granted herein.

C. J. SMYTH, *Att'y Gen.*,
ED. P. SMITH, *Deputy,*
Att'ys for Defendant.

Endorsed: District court Lancaster county Nebraska—Thomas P. Kennard plaintiff *vs.* State of Nebraska, defendants—Motion for a new trial—Clerk's office district court—Filed Mar. 11, 1898—Sam. E. Low, clerk district court.

38 *Mandate.*

In the Supreme Court of the State of Nebraska, Sitting at Lincoln, January Term, 1899.

To the district court of the third judicial district, sitting in and for the county of Lancaster, Greeting:

Whereas, in a late action before you, wherein Thomas P. Kennard was plaintiff and The State of Nebraska was defendant the said plaintiff recovered a judgment against said defendant upon a transcript of which record and proceedings in your said court the said defendant prosecuted a petition in error to the supreme court of the State of Nebraska, upon a trial of which cause in said supreme court during the January term A. D. 1899, it was considered by said court that the judgment rendered by you in favor of said plaintiff, and against the said defendant be reversed at the costs of said plaintiff, taxed at $51.75 and cause remanded for further proceedings.

Now therefore, you are commanded without delay, to proceed in said cause according to law.

Witness the Hon. T. O. C. Harrison, chief justice and the seal of said court at Lincoln, this 20th day of June, 1899.

[SEAL.] D. A. CAMPBELL, *Clerk.*

Endorsed: Mandate—Supreme court State of Nebraska—Costs supreme court $51.75—Bal. due clerk 19.55—Due def't 32.20—Clerk district court Filed Jun- 21 1899 J. H. Mallalieu clerk.

Journal Entry.

That on the 7th day of October A. D. 1899 (that being the 27th judicial day of the September A. D. 1899 term of said court) were had and done the following proceedings as appears upon Court Journal "34" at page "409" to wit;

THOMAS P. KENNARD *vs.* THE STATE OF NEBRASKA. } 21–27. Mandate.

Now on this day came the parties hereto with their attorneys, and trial of this cause is now had to the court without the intervention of a jury, the same being waived by agreement of parties in open court, and is submitted upon the pleading evidence adduced and upon all of the files and the record of this case, on due consideration whereof and being fully advised in the premises the court finds upon the issues joined herein in favor of the defendant.

It is therefore considered, and adjudged by the court that
39 the said plaintiff take not-ing by his writ and that the defendant go hence without day and have and recover of and

from the said plaintiff its costs herein expended taxed at $76.86 to all of which the plaintiff duly excepts.

Motion for New Trial.

In the District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant. } Motion for New Trial.

Now comes the plaintiff and moves the court that the judgment heretofore rendered be set aside and a new trial granted for the following reasons;

1. The finding and judgment of the court in favor of the defendant are contrary to the facts in the case.
2. The finding and judgment of the court are contrary to law.
3. For errors of law occurring during the trial of the case which were duly excepted to by the plaintiff.
4. The court erred in rendering judgment against the plaintiff and in favor of the defendant.
5. The court erred in not rendering judgment in favor of the plaintiff upon the pleadings and the evidence.

T. S. ALLEN AND
A. S. TIBETTS,
Att'ys for Pl'ff.

Endorsed: In the district court of Lancaster county Nebraska—Thomas P. Kennard, plaintiff *vs.* The State of Nebraska, defendant—Motion for new trial—Clerk's office, district court—Filed Oct. 7 1899 C. O. Boettcher, clerk district court.

Journal entry.

That on the 7th day of October A. D. 1899 (that being the 27th judicial day of the September A. D. 1899 term of said court) were had and done the following proceedings as appears upon Cour- Journal "34" at page "411" to wit;

40

THOMAS P. KENNARD
vs.
THE STATE OF NEBRASKA. } 21–27.

This cause now comes on to be heard upon the motion of the plaintiff to set aside the findings and judgment of the court entered herein and for a new trial of this cause and is submitted to the court, on due consideration whereof the court doth overrule said motion to which the said plaintiff duly excepts, and forty days from the rising of the court are hereby given him to reduce his exceptions to writing.

Journal Entry.

That on the 20th day of July A. D. 1899 (that being the 57th judicial day of the May A. D. 1899 term of said court) were had and done the following proceedings as appears upon Court Journal "35" at page "96" to wit:

"It is hereby ordered, that all matters, motions and cases now pending in this court, and not otherwise disposed of be and the same hereby are continued until the next term of court."

This May A. D. 1899 term of this district court, was begun on the 1st day of May A. D. 1899, and continued from day to day and from time to time by regular adjournment until this 20th day of July A. D. 1899 and is now adjourned without day.

41 *Certificate.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, C. O. Boettcher, clerk of the district court third judicial district of Nebraska, in and for the county of Lancaster, do hereby certify that the above and foregoing is a true and correct copy of the petition; demurrer of defendant; answer of defendant; motion for a new trial by defendant; mandate; motion for new trial by plaintiff with endorsements on each; ruling of the court on demurrer of defendant; ruling of the court on motion of def't for a new trial; ruling of the court on plaintiff's motion for a new trial, together with proceedings of trial, final judgment, adjournment *sine die* of our said court in a cause therein wherein Thomas P. Kennard is plaintiff and The State of Nebraska, is defendant as the same appears fully upon the records and files of said court, and now in my charge remaining as clerk aforesaid.

I hereby further certify that hereto attached is the original bill of exceptions, filed in the above-entitled cause on the 15th day of April A. D. 1898 and made a part hereof.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court at Lincoln this 14th day of December A. D. 1899.

[Seal District Court of Lancaster County, Nebraska.]

C. O. BOETTCHER, *Clerk D. C.*,
By W. L. CRANDALL, *Deputy.*

Trans. fees, $8.00; p'd by T. S. Allen.

{ Ten-cent United States internal-revenue stamp, canceled 12, 14, '99. C. O. B. }

[Endorsed:] 11125. Kennard *v.* State. Transcript. Supreme court of Nebraska. Filed Dec. 15, 1899. D. A. Campbell, clerk.

42 In the District Court of Lancaster County, Nebraska.

Clerk's office, district court. Refiled Nov. 16, 1899. C. O. Boettcher, clerk district court.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant.

Appearances: For plaintiff, A. S. Tibbets; for defendant, C. J. Smyth, attorney general.

Be it remembered, that at the September term of 1899, the Lancaster county district court, to wit: October 7th, 1899, that being one of the days of said term, on the hearing of the case wherein Thomas P. Kennard was plaintiff, and The State of Nebraska was defendant, before the Honorable Albert J. Cornish, judge, the above-named plaintiff and the above-named defendant, each to maintain the issues of their respective parts, adduced testimony, and all of the said testimony, the objections thereto with the grounds therefor, all the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, having been by the plaintiff reduced to writing in this its proposed bill of exceptions, and the same having been served on the attorneys for the defendant for examination and amendment; the said plaintiff now pray- the honorable judge, before whom said cause was heard, that this bill of exceptions may be settled, allowed, signed, sealed and made a part of the record in said cause in said court.

43 In the District Court of Lancaster County, Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant.

And the — in the above-entitled cause, in the district court of Lancaster county, third judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose reduced to writing in this its proposed bill of exceptions, all of the testimony adduced or offered on both sides of the above-named cause in the before-named court; all of the objections, with the grounds therefor, made to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions to such rulings, made and taken at the time, and having served the same on the attorneys for the above-named — according to law, for examination and amendment; and the same being now before me, the undersigned judge, before whom said cause was tried, on the motion of the attorneys for the — that the same may be settled, allowed, signed, sealed and made a part of the record in the said cause in the said court. Now I, the said judge,

Do hereby certify, that this bill of exceptions contains all of the evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony,

all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time, and I,

Do hereby order, that it be made a part of the record in the said cause, in the said court.

Done at Lincoln, Nebr., this 16th day of November, A. D. 1899.

ALBERT J. CORNISH,
Judge District Court.

44 It is stipulated and agreed, between the parties hereto that the bill of exceptions heretofore made in this case may be introduced in evidence by either party without objection.

By Mr. TIBBETS: The plaintiff offers in evidence a certified transcript of the bill of exceptions in the case of Thomas P. Kennard *vs.* State of Nebraska the same being a complete transcript of the evidence in said case heretofore tried in this court. (Identified as Exhibit "A" hereto attached.) Subject to all of the objections of counsel, rulings of the court incorporated therein.

Plaintiff rests.

Defendant rests.

Received the within bill of exceptions for examination and amendment this 16th day of November, 1899.

C. J. SMYTH,
Attorney General,
By N. D. OLDHAM, *Dep.*

LINCOLN, NEBR., *Nov.* 16, 1899.

I hereby return the within bill of exceptions and suggest — amendments.

C. J. SMYTH,
Attorney General,
By N. D. OLDHAM, *Dep.*

$1.50 fees paid by Allen.

[Endorsed:] Clerk's office, district court. Filed Nov. 16, 1899. C. O. Boettcher, clerk district court.

45 EX. "A."

Clerk's office, district court. Filed Apr. 15, 1898. Sam. E. Low, clerk district court.

46 In the District Court of Lancaster County, State of Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant.

Appearances: For plaintiff, A. S. Tibbets and T. S. Allen; for defendant, C. J. Smyth and Ed. P. Smith.

Received the within bill of exceptions for examination and amendment this 14th day of March, 1898.

TIBBETS BROS.,
MOREY & FERRIS,
Attorney for —.

LINCOLN, NEBRASKA, *Apr.* 12, 1898.

I herewith return the within bill of exceptions and suggest no amendments.

A. S. TIBBETS AND
T. S. ALLEN,
Attorney for Pl'ff.

47 *Index.*

	Direct.	Cross.
Thomas P. Kennard, plaintiff	7	25
Rebuttal.		
Thomas P. Kennard, plaintiff	34	37
Exhibits.		
Plaintiff's:	Offered.	Found.
"1" trans. Int. Dept.	4	38
"2" certificate, auditor	6	40
"3" certificate, treasurer	7	42
"4" decision Int. Dept.	20	43
"5" letter—Strode	23	52
Defendant's:		
"A" report to legislature	34	54

48 Be it remembered, that at the February term, 1898, of the Lancaster county, Nebraska, district court, to wit: March 10th, 1898, that being one of the days of said term, on the hearing of the case wherein Thomas P. Kennard was plaintiff, and The State of Nebraska was defendant, before the Honorable Albert J. Cornish, judge, the above-named plaintiff and the above-named defendant, each to maintain the issues of their respective parts, adduced testimony, and all of the said testimony, the objections thereto with the grounds therefor, all the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, having been by the defendant reduced to writing in this its proposed bill of exceptions, and the same having been served on the attorneys for the plaintiff for examination and amendment; the said defendant now pray the honorable judge, before whom said cause was heard, that this bill of exceptions may be settled allowed, signed, sealed and made a part of the record in said cause in said court.

49 It is stipulated and agreed, between the parties hereto that the testimony in this case can be taken before the Honorable A. J. Cornish, judge of the district court, in vacation, and all of the exceptions preserved, and the evidence so taken to be used as the evidence on the hearing of this case at the trial in the regular term of this court.

By Mr. TIBBETS: The plaintiff offers in evidence a certified transcript of the books of the Department of the Interior of the General Land Office at Washington in the District of Columbia, so far as

the same relates to moneys accrued and paid to the State of Nebraska, on the net proceeds of the sale of lands of the Pawnee Indian reservation. (Identified as Exhibit "1," and found on page "38.")

Mr. SMITH: The defendant objects to the introduction of this exhibit and of any evidence in this case for the following reasons, to wit:

50 1st. Because this court has no jurisdiction over the subject-matter, and no right to hear and determine the question in controversy in this case.

2nd. Because this court has no jurisdiction of the defendant, or any right to pass upon the matters in dispute in this case.

3rd. Because, under the constitution and laws of the State of Nebraska, all claims against the State treasury, must first be presented to the auditor of public accounts for audit and adjustment, and if the same be disallowed by him, in whole or in part, the party presenting the claim must appeal therefrom; it does not appear from the petition in this case that this claim was ever presented to said auditor for audit and approval.

51 4th. The petition shows on its face that the account or claim, of the plaintiff, if he ever had any, is barred by the statute of limitations.

5th. The exhibit offered in evidence is incompetent, immaterial and irrelevant; no proper foundation is laid for its introduction, and it is a mere conclusion on the part of the officer making the certificate, and does not purport to be a certified transcript of any record in his office, or any other, and is not the best evidence.

Overruled. Exception.

Mr. TIBBETS: The plaintiff offers in evidence the certificate of John F. Cornell, auditor of public accounts, of the State of Nebraska, as to the moneys received from the Pawnee Indian reservation. (Identified as Exhibit "2," and found on page "40.")

Mr. SMITH: The defendant objects to the exhibit offered as incompetent, immaterial and irrelevant; not the best testimony and no proper foundation laid, but this objection does not go to

52 the failure to have attached to the certificate the seal of the auditor or official making the certificate.

Overruled. Exception.

Mr. TIBBETS: The plaintiff offers in evidence the certificate of J. B. Messerve, as to the funds received by the State of Nebraska, as shown by the books. (Identified as Exhibit "3," found on page "42.")

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant; not the best evidence and does not purport to be a certified copy of any record, but merely an officer's conclusion of what the record discloses.

Overruled. Exception.

Mr. THOMAS P. KENNARD, being produced on behalf of the plaintiff, was duly sworn and testified as follows:

Examined in chief by Mr. TIBBETS:

1 Q. Mr. Kennard, you are the plaintiff in this case?
A. Yes sir.
2 Q. How long have you resided in the State of Nebraska?
A. Ever since it became a State, thirty years I think.
3 Q. Where do you reside now?
53 A. In the city of Lincoln.
4 Q. Are you the party, Mr. Kennard, who signed this contract as Thomas P. Kennard to Exhibit "B" attached to the petition in this case?
A. Yes sir.
5 Q. After you entered into the contract with the State of Nebraska, you may state what you did in pursuance of that contract?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant, as the petition shows for itself, that his claim, if he ever had any, is barred by the statute of limitations, and this court has no jurisdiction to hear and determine the matters in controversy in this case.
Overruled. Exception.

A. Well, it would be quite a lengthy recital for me to state the whole of my transactions under that contract, and if it is permissable I don't know that I could get in any more concise language than I did in the report I made to the last legislature of all my proceedings under that contract.
6 Q. Well, just go on and state what you did?
54 A. In a general way, after my appointment, or prior to my appointment the State of Iowa had passed a similar * * *
7 Q. Just state what you did.
A. The first thing I did was to go over to Iowa and confer with the State agent of Iowa and we mapped out our program, then we both went to Washington; the first year I spent over half of my time in Washington in different phases of the subject-matter of the contract, but I didn't accomplish anything at that time, during that year I had to go back and forth I think six or seven times spending considerably over a year's time in the prosecution of the subject-matter of the contract.
8 Q. That is you spent several years?
A. Yes sir, for over a year I went to Washington and took up some phase of the subject-matter of the contract and spent over a year of my time and about thirty-five hundred dollars out of my own pocket in furtherance of the object of the contract. * * *

Mr. SMITH: The defendant moves to strike out that part of the answer wherein the witness states what he spent as incompetent,

immaterial and irrelevant not competent testimony because
55 the contract speaks for itself, and whether he did, or did not, spend any of his own money does not go to the merits of his claim.

Mr. TIBBETS: We insist upon showing what he did, how much he expended and what he accomplished.

Mr. SMITH: And the defendant objects as incompetent, immaterial and irrelevant.

By the COURT: I am inclined to think that he can show what he did under the contract. Overruled for the present.

Exception.

9 Q. State what you did further; with what officers of the Government did you confer?

A. In the first place when I went there I went before the Land Office—the Commissioner of the General Land Office, who is the governing officer in that department and he overruled my claim.

Mr. SMITH: The defendant objects as not the best evidence.

Overruled. Exception.

56 10 Q. State what else you did?

A. From there I went to the Secretary of the Interior; I hardly know how to get at the subject in the regular order.

11 Q. Did you get an allowance of the claim before the Secretary of the Interior?

A. I did after it had gone to the Attorney General of the United States and come back to the Secretary of the Interior; then I went before the Secretary of the Interior two or three times and asked that it be referred to the solicitor of that department to be heard upon its legal merits.

12 Q. Did you obtain a decision from the Interior Department?

A. I did.

13 Q. You may state what you did next?

A. I then went to the Treasury Department; the claim had to go before the Comptroller of the Treasury, he held it a certain length of time and I came home.

14 Q. When did you next obtain a decision from any of the departments, or officers of any of the departments in Washington concerning this matter and this application?

A. I haven't got the date in my mind, but the decision will show, or the letter informing me of the decision that will show.

57 15 Q. Can you tell the date you obtained the final decision?

A. No sir.

16 Q. Can you by refreshing your memory from your book?

A. No, I cannot, I had the decision of the department sent to me.

(Handing witness book.)

A. Yes sir.

17 Q. When was it that you obtained the final decision of the Interior Department in this matter?

A. The 14th day of January, 1881.

18 Q. Mr. Kennard, some time after this decision, that you obtained from the Interior Department, in January 1881, did you have any conversation with the governor or the executive officer of the defendant, in relation to moneys received under that claim, if so what was it?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant, calling for the conclusion of this witness, and for oral statements made by a party who has no power to bind this defendant by any admissions, declarations or statements he may have made.

By the COURT: I am willing to let you get in anything that goes to show that but for Mr. Kennard's labors the State would
58 not have got this money.

Overruled. Exception.

A. I had some talk with the governor after he received the warrant; the United States warrant.

19 Q. Mr. Kennard, did you receive a communication from the Department of the Interior in relation to moneys that arose from this decision of the department and were due the State?

A. I did.

20 Q. How long after this decision was rendered, or how long after January 1881 did you receive this communication?

A. I can't call to mind now, some time after that.

21 Q. In what way was that communication received?

A. By letter.

22 Q. Through the ordinary course of the mails?

A. Yes sir.

23 Q. Where is that letter?

A. That letter, with quite a number of other things was taken from the clerk of the legislature, the first time my claim was before it, and lost.

24 Q. Have you searched for it?

A. I have.

25 Q. Have you been able to find it?

A. No sir.

26 Q. State the contents of that letter?

59 Mr. SMITH: I wish to cross-examine the witness.

27 Q. From whom was that letter received?

A. I think from the Treasury Department.

28 Q. Do you know who signed it?

A. I do not.

29 Q. Were you at the time, acquainted with the party who signed it?

A. I think so.

30 Q. Did you, at that time, know the handwriting of the person who signed the letter?

A. My best recollection is that it was Mr. Wyman, now residing in Omaha, then Treasurer of the United States.

31 Q. Was it written by himself?
A. It was written by Mr. Wyman I think; that is my recollection.
32 Q. Are you now prepared to tell the court who signed that letter.
A. I think Mr. Wyman did.
33 Q. Did you know Mr. Wyman's signature?
A. I believe so; I had had communications from him on other matters.
34 Q. Did you ever see him write his name?
A. I don't think I ever saw him write it.

60 Mr. SMITH: The defendant objects as incompetent, immaterial, and irrelevant; no proper foundation laid for the introduction of such testimony, and further, it would simply be a statement by a party not under oath and would be incompetent to bind the defendant in this case.
Overruled. Exception.

Mr. TIBBETS, continuing examination:

35 Q. You may state the contents of that letter.
A. It simply informed me that a warrant for so much was there awaiting my receipt to the department, and informing me that it would be necessary for me to have the power of an attorney from the governor, which I asked for and he declined to give.
36 Q. After that, what was done?
A. I asked them to forward the warrant to the governor.
37 Q. Did you see the warrant in the hands of the governor?
A. I did.

(Handing witness Exhibit "1.")

38 Q. Examine Exhibit "1" and state if you can, or take the first item, the warrant for $4,281.62; did you see that warrant in the hands of the governor?
A. Yes sir.
61 39 Q. What governor?
A. Governor Nance.
40 Q. Take the next item, $1,893.87, August 21st, 1882; did you see that warrant, after its receipt by Governor Nance.
A. Yes sir.
41 Q. What did he tell you in relation to this warrant?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant; that the same is hearsay testimony and a statement on the part of one who had no authority to bind the defendant in this case, and not the best evidence.
Overruled. Exception.

A. Governor Nance informed me that he had these warrants and I filed before him an application for my part of the money under the contract, and after holding it for some time he deposited it in

42 Q. Those two warrants?

A. Yes sir. He didn't pay me any part of it.

43 Q. Take the third item in the last column of Exhibit "1," what do you know of that warrant for $17,495.95?

A. I didn't see that warrant.

44 Q. Did you have any talk with Governor Dawes in relation to that matter?

62 A. Yes sir.

45 Q. At the time you had the talk with Governor Dawes, where was it?

A. At his office.

46 Q. Where was that?

A. At the capitol of the State of Nebraska.

47 Q. And who was acting governor, at that time, of the State of Nebraska?

A. Governor Dawes.

48 Q. State what he told you at that time.

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant and as hearsay testimony.

Overruled. Exception.

A. He told me that he would have to deposit it in the State treasury.

49 Q. Take the last item of $3,272.57, remitted under date of September 11th, 1886, what do you know concerning that?

A. I have not such a clear recollection with reference to that one.

63 50 Q. Prior to this first remittance of January 7th, 1882, do you know of your own knowledge whether the State had received any money from the Government arising from the proceeds of the sale of Indian reservation lands in Nebraska?

By Mr. SMITH: The defendant objects as incompetent, immaterial, irrelevant and not the best evidence.

Overruled. Exception.

A. The State had not received anything from the sale of Indian reservation land up to that time.

51 Q. Are you able to state, from your own knowledge, as to whether or not the moneys that are described in Exhibit "1," as remitted to the State of Nebraska, and as described in Exhibits "2" and "3" as received by the State of Nebraska, were obtained through the decision of the Interior Department of the United States, that you obtained in 1881?

By Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant, as calling for a conclusion of this witness, and not a statement of any fact.

Sustained.

64 52 Q. How much money did the State of Nebraska receive as a direct result of your efforts under this contract which you made with Governor Furnace?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant and as calling for a conclusion of this witness and assuming that the State received anything as a result of his efforts.

Sustained.

53 Q. Mr. Kennard, when you obtained the decision from the Interior Department in January, 1881, in what way was that decision communicated?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant.

Overruled. Exception.

A. It was communicated by a communication from the department at Washington, from the Commissioner of the General Land Office.

54 Q. To whom?

A. To me.

55 Q. In what manner?

A. By letter from the department.

56 Q. Through what source?

A. Through the regular mail channels of the United States. The postal channels.

65 57 Q. Did you receive a letter from the department in which the decision was announced?

A. I did.

58 Q. Have you that letter?

A. I have.

59 Q. When did you receive it?

A. I can't remember now; it was a few days after the decision on January 14th, 1881.

60 Q. Have you that decision with you?

A. I have.

61 Q. Will you produce it?

A. I will. (Handing to Mr. Tibbets paper identified as Exhibit "4.")

Mr. TIBBETS: The plaintiff offers Exhibit "4" in evidence. (Found on page "43.")

Mr. SMITH: The defendant objects as incompetent, immaterial, and irrelevant, and no proper foundation having been laid for its introduction in evidence.

Overruled. Exception.

62 Q. Now Mr. Kennard, did you obtain from the department a subsequent decision, or did the department make a subsequent decision, say in about 1885, whereby this was changed in any manner?

66 Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant and calling for a conclusion of the witness, and not the best evidence.

Overruled. Exception.

A. I did not obtain an additional decision, but they made one.

63 Q. When were you informed of that change in the ruling of the department, and in what manner?

Mr. SMITH: The defendant objects as incompetent, immaterial, and irrelevant.

Overruled. Exception.

A. I don't remember, exactly, when I was first informed that they had made this other decision.

64 Q. Did you receive a communication from the department in relation to a change in the ruling of the department?

A. Yes sir.

65 Q. When did you receive that communication?

A. I think it was in January last.

66 Q. In what form did you receive that communication?

A. I got it in the form of a letter, a copy of the decision, that is the later decision.

67 Q. In what way was that letter transmitted to you?

A. Through the regular channels of the mails.

67 68 Q. Where is that letter?

A. I don't know, I have lost it. I looked for it today, but I couldn't find it. I have lost it I guess.

69 Q. Have you looked for it?

A. Yes sir.

70 Q. Have you been able to find it?

A. I have not.

71 Q. You may state the contents of that letter.

Mr. SMITH: The defendant objects as incompetent, immaterial, irrelevant, heresay testimony and not the best evidence.

Overruled. Exception.

A. The gist of the letter was that they had reversed their former decision, that is Secretary Lamar had reversed the former decision and declined to pay any more money to the State of Nebraska on this claim.

72 Q. On the Pawnee Indian reservation?

Mr. SMITH: The defendant objects as incompetent, irrelevant and immaterial, not the best evidence, and giving a quasi-judicial decision.

Overruled. Exception.

A. Yes sir.

68 73 Q. Mr. Kennard, what reason was given in that letter for overruling the decision of January 14th, 1881?

Mr. SMITH: The defendant objects as incompetent, immaterial, and irrelevant, calling for heresay testimony and not the best evidence; the decisions of the departments, the same as decisions of the courts, must be proved by copies of themselves.

Overruled. Exception.

A. Their decision was that from these Pawnee Indian lands, the

Government got nothing from them and that there was no 5 % coming to the State and the former decision was erroneous.

74 Q. About the same time did you receive a communication from the Honorable J. B. Strode, enclosing a letter to him from the Department of the Interior?

A. Yes sir.

75 Q. Have you that letter which was enclosed?

A. I have. (Witness produced letter, which is identified as Exhibit "5.")

Mr. TIBBETS: We offer this letter in evidence. (Found on page "52.")

69 Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant; hearsay testimony, purporting to give the decisions of the departments on matters before them, which can only be shown by duly certified copies of their records, and is not the best evidence.

Sustained. Exception.

76 Q. Mr. Kennard, did you prepare at any time, a printed statement of this case?

A. I did.

77 Q. Mr. Kennard, your action here is to get some fifteen thousand dollars due you, do you know the reasonable and fair value of your services in connection with this transaction?

Mr. SMITH: The defendant objects, as incompetent, immaterial, and irrelevant; not in issue in this case, being an action upon an express contract and not upon its merits.

No ruling.

78 Q. Have you ever been paid for your services and for money expended on this contract?

A. No sir. Nothing.

79 Q. Do you know whether the State has ever made an appropriation for you for your services under that contract?

70 Mr. SMITH: The defendant objects as not the best evidence.

Overruled. Exception.

A. They never passed an appropriation that became a law.

80 Q. Have they ever made an appropriation for the payment of this money?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant.

Overruled. Exception.

A. They never made an appropriation.

Cross-examination by Mr. SMITH:

81 Q. Mr. Kennard, when you first began your labors did you file a written claim before any of the departments at Washington?

A. Yes sir.

82 Q. What did you include in that claim?

A. The first claim I made was for 5 % upon all of the military land reservations that were located in the State.

83 Q. Was that allowed?

A. No, sir; it was disallowed. The second claim I filed
71 was for 5 % upon all the land included in the different Indian reservations including all the Indian reservations within the State, counting them at $1.25 per acre, or $2.50 per acre, I don't remember which, but I think $1.25 per acre.

84 Q. In filing your claim then you simply placed an arbitrary price upon all the land included in the Indian reservations and filed you- claim for 5 % of the aggregate amount?

A. Yes sir.

85 Q. Was that claim allowed or disallowed?

A. It was disallowed.

86 Q. When did you file that claim?

A. I can't recall the dates now.

87 Q. Well, the year?

A. That must have been in seventy-four or seventy-five.

88 Q. You proceeded upon the theory that the State ought to have 5 % upon the value of this land, which would include then the Indian reservations?

A. Yes sir.

89 Q. The Government had never placed this land, at that time, upon the market?

A. No sir.

90 Q. When you filed that claim you say it was disallowed?

A. Yes sir.

91 Q. Why didn't you file a claim for 10 % or any other amount?

72 Mr. TIBBETS: The plaintiff objects as incompetent, immaterial and irrelevant.

Overruled. Exception.

A. Simply because they had passed two laws that referred to that, one in Mississippi and another in Alabama, granting them 5% upon reservation lands, estimating it at $1.25 or $2.50 per acre, and the conclusion of the last law they passed was, "and to all other States." Under that law I claim we had a right to ask the same upon the reservation lands within our State.

92 Q. Is it true that in these other States their enabling act provided that it should go into the school fund the same as our enabling act does?

A. No sir. Some of it went to public roads, some to the school fund and some to other things.

93 Q. Then when you filed this claim before them first you filed it for 5% of the value of the lands at the price you fixed, including all the lands which were then in Indian reservations, and not disposed of to the public, and that claim was disallowed?

A. Yes sir.

94 Q. At the time this contract was entered into between
73 you and the governor of the State the lands included then, the Pawnee reservation?

A. Yes sir.

95 Q. Had none of them been placed on the market and offered for sale?

A. I think not.

96 Q. When were the lands included within the Pawnee reservation placed upon the market and sold?

A. I can only give it very indefinitely. I think in seventy-eight, but I am not sure, but quite a while after I had this other.

97 Q. Quite a while after the contract was made between yourself and the governor that these Pawnee lands were placed upon the market and sold?

A. Yes sir.

98 Q. But in the meantime you had filed this claim for 5%, this arbitrary valuation, and the claim was disallowed?

A. Yes sir.

99 Q. So all the claims which the State had at the time this contract was entered into was because this land was occupied as an Indian reservation and not because it had been thrown open to settlement?

A. I don't know.

100 Q. You proceeded on that theory did you not?

74 A. I proceeded first upon the theory that we were entitled to the same consideration from the Government as other States, as that law extended to us the same as to all other States, which gave them 5% of $1.25 per acre.

101 Q. The State did not have any claim for 5% arising from the sale of these lands until 1878 or about that time did they?

A. It had a claim, but didn't get it paid.

102 Q. Did it have a claim arising out of the sale of these lands prior to 1878?

A. It had a claim, but the department overruled the claim.

103 Q. Did it have any claim arising out of the sale of these lands until 1878?

A. Mr. Smith, I claim in my pleadings that the creating of Indian reservations by metes and bounds disposes of the land and we are entitled to our rights and should have our 5 %.

104 Q. And the department ruled against you?

A. Yes sir.

105 Q. Then the department at Washington refused to recognize any claim to 5 % of the proceeds until after the land was placed on the market and sold in seventy-eight?

75 A. Yes sir, or whatever the date is.

106 Q. They refused to recognize any claim of the State of Nebraska to 5 % of the valuation of this Indian reservation land until after it was placed on the market and sold on or about the year 1878?

A. Yes sir.

107 Q. Never until Congress passed a law placing these lands on sale that they received anything?

A. Yes sir.

108 Q. Until after that act of Congress placing the lands on the market for sale?

A. Yes sir.

109 Q. The first moneys received by the State from the Government on account of the sale of this land in the Pawnee Indian reservation, was 5 % of the money which was received by the Interior Department from the proceeds of this land was it not?

A. Yes sir.

110 Q. In other words, after it was placed on the market and sold and paid for by the purchaser then they paid the State of Nebraska 5 % of the proceeds of those sales?

A. Yes sir.

111 Q. When was the first payment received?

A. I can't recollect without just going over that account.

76 (Handing witness Exhibit "1.")

A. It seems here (referring to Exhibit "1") that the first payment was January 17th, 1882.

112 Q. Is that your recollection of about the time you saw the warrant in the hands of Governor Nance?

A. I think so.

113 Q. About what time did the governor turn that warrant into the treasury?

A. I can't tell.

114 Q. About what time?

A. I think in October; quite awhile afterwards because we had quite a good deal of controversy about it.

115 Q. It was in October 1882?

A. I think so.

116 Q. You knew about the time it was turned in?

A. Yes, he informed me; I had two hearings before him; I had attorneys and the question was discussed and he finally told me that he was going to turn it into the treasury.

117 Q. Then it was some time in 1882 that it was turned into the treasury?

A. Yes sir.

77 118 Q. Did you ever, thereafter file with the auditor of public accounts of the State of Nebraska a claim for any portion of that money?

A. I think not, not that I remember of.

119 Q. When was the next money received by the State from Washington?

A. I only say, or swear from these dates, for it is over twenty years ago. August 21st, 1882.

120 Q. That was turned over at the same time?

A. At the same time I think.

121 Q. So that you knew some time in 1882 that the money had been turned over to the State of Nebraska?

A. Yes sir.

122 Q. Did you ever file a claim with the auditor of public accounts of the State of Nebraska for any portion of that money?

A. I think not.

123 Q. When was the next money received by the State from Washington?

A. June 11th, 1884.

124 Q. You knew of that money being received at or about the time it was received, did you?

A. Yes sir.

125 Q. When was it turned into the treasury?

A. I don't know.

126 Q. Some time after that?

78 A. Yes sir, pretty soon after that.

127 Q. You knew some time during the year 1884 that the money represented by that draft had been turned into the treasury?

A. Yes sir.

128 Q. Did you ever file a claim with the auditor of public accounts of the State of Nebraska for any part of that money?

A. I think not.

129 Q. When was the next money received?

A. In September 1886.

130 Q. You knew of its being received during that year?

A. I didn't know when it was received, but I knew that much more had been allowed.

131 Q. When did you first learn it had been received?

A. I think possible that year, but I am not sure about that, but it was within a year.

132 Q. Did you ever file with the auditor of public accounts of the State of Nebraska a claim against the State of Nebraska, for any part of that money?

A. No sir.

133 Q. Have you ever, at any time, filed with the auditor a claim against the State of Nebraska for any part of the

79 moneys for which you have brought suit in this case?

A. I think not.

(Handing witness paper identified as Defendant's Exhibit "A.")

134 Q. Calling your attention to Exhibit "A," you may state what that is Mr. Kennard?

A. It is a report of my proceedings under my contract with the State of Nebraska, it is a report to the legislature of the State and asking for an appropriation.

135 Q. Was this published by your authority and by yourself?

A. Yes sir.

136 Q. And you caused this to be published as setting forth a correct statement of what you did under and by virtue of the contract on which you brought suit?

A. Yes sir.

Mr. SMITH: We offer Exhibit "A" in evidence. (Found on page "54.")

Plaintiff assenting.

Rebuttal Testimony.

Direct examination by Mr. TIBBETS:

137 Q. In your early efforts before the authorities at Washington—Federal authorities—and in fact all you- efforts you
80 tried to reach some valuation of the land, as I understand you, upon which to base and measure what should come to the State?

A. Yes sir.

138 Q. And your argument, as I understand from your cross-examination, that you made to the department was that these lands had been segregated, or set aside for the benefit of the Indians and the State had been deprived of its 5%, under the provisions of the enabling act, and therefore, the United States should make some compensation to the State for the loss of that 5%?

A. Yes sir.

139 Q. Upon what basis of valuation was the final settlement to be determined as to what value should be placed upon these lands and the basis or amount the State should receive?

A. The lands in the Pawnee reservation was sold at public auction and they gave 5% upon the net proceeds of that sale.

140 Q. And that is the value of the lands that they placed, and gave to the State that amount?

A. I will state that they were to, but they have not done it.

81 141 Q. And the moneys you claim you obtained from them was from that allowance, and that basis of valuation?

A. Yes sir.

142 Q. Mr. Kennard, you stated that you had never filed any claim with the State auditor; what efforts did you make to get your money or claim from the State?

Mr. SMITH: The defendant objects as incompetent, immaterial and irrelevant.

Overruled. Exception.

A. I have applied to the legislature three different times, and reported to the governor and legislature, and asked an appropriation for the amount due.

143 Q. After you had this report published did you make application to the legislature?

A. Yes sir, only a year ago.

144 Q. What was done with that application?

A. It was referred to the committee on claims.

145 Q. Was there any appropriation made by the legislature so the State auditor could allow you a single cent upon this claim?

A. Not at all, it was always claimed to be an indefinite amount.

146 Q. The legislature never made an appropriation that you could resort to through the State auditor for the payment of this claim?

A. No sir.

82 *Rebuttal Testimony.*

Cross-examination by Mr. SMITH:

147 Q. In the sale of these Pawnee lands is it not true that they were sold at public sale and from the proceeds the Government deducted the expenses of the sale and paid 5 % of the net proceeds to the State?

Mr. TIBBETS: The plaintiff objects as incompetent and immaterial.
Overruled. Exception.

A. I understood that to be the case.

By Mr. TIBBETS:

148 Q. And that was the basis of the measurement of the valuation of the lands?
A. Yes, sir.

Witness excused.
Plaintiff rests.
Defendant rests.

83 *Copy Plaintiff's Exhibit "1," Offered on Page "—."*

4–207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 11, 1897.

I, E. F. Best, acting, Commissioner of the General Land Office, do hereby certify that the annexed statement of moneys accrued, and paid to State of Nebraska on the net proceeds of the sales of land embraced within Indian reservations is a true and literal exemplification of the records of this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

E. F. BEST,
[SEAL.] *Acting Commissioner of the General Land Office.*

5 % FUND. NEBRASKA. INDIAN RESERVATION.

Statement of Moneys Accrued and Paid to State of Nebraska on the Net Proceeds of the Sales of Lands Embraced within Indian Reservations.

Name of tribe or reservation.	Period embraced by adjustment.	Gross receipts from sales of land.	Incidental expenses.	Net proceeds.	5 % of net proceeds sale of Indian land.	No. report.	How paid.	Amount.
Sundry permanent Ind. res.	Rejected by comptroller	.....	.....	.....	.....	35251		
Pawnee .	Jan. 1, 1878, to June 30, 1879..	40,821.95	944.64	39,877.31	1,993.87	"	Warrant on U. S. Treas'r.....	.....
" .	July 1, 1879, to June 30, 1880..	85,716.74	84.69	85,632.05	4,281.60	"	No. 68 dated Jan. 17, 1882.	4,281.60
" .	" 1, 1880, " " 30, 1881.	70,505.49	5,054.03	65,451.46	3,272.57	"	" 1409 " Aug. 21, 1882.	1,993.87
" .	" 1, 1881, " " " 1882..	196,022.43	6,298.77	189,723.66	9,486.18	"	" 1583 " June 11, 1884.	17,495.95
" .	" 1, 1882, " " " 1883..	165,858.38	5,663.08	160,195.30	8,009.77	.....	" 440 " Sep. 11, 1886.	3,272.57
		558,924.99	18,045.21	540,879.78	27,043.99			27,043.99

85 (*Copy of Plaintiff's Exhibit* "2.")

MARCH 6, 1897.

I, John F. Cornell, auditor of public accounts of the State of Nebraska, certify that the records of this office show that on page "445" of the General Journal for 1882 that treasurer's receipt # 1710 filed in October 1882 was as follows:

Albinus Nance, governor, being ("5 %") five per cent. of net proceeds on sale of lands in the State of Nebraska heretofore embraced in the Pawnee Indian reservation as per adjustment account between the U. S. and the State of Nebraska for the amount of $6,275.47.

Also on page 186 of the General Journal for 1884 book entries show treasurer's receipt # 2213 was issued to James W. Dawes, governor, and was for the sum of $17,495.95 and was for five per cent. (5 %) on sale U. S. Government lands.

Also in book called Settlements with County Treasurers, Book C on page 162, entries showing that treasurer's receipt # 2957 dated Nov. 10, 1886 was issued to James W. Dawes, governor, and was for the amount of $3,272.57 and was for five per cent. (5 %) on sale of U. S. lands. Like entry of the latter will also be found on
86 page 107 of the General Journal for 1886.

JOHN F. CORNELL,
Auditor of P. A.,
Per C. C. POOLE.

87 (*Copy Plaintiff's Exhibit* "3.")

This is to certify that the books of the State treasurer discloses the following facts:

On page 543 of the day book we find the following entry:

October 27, 1882.—Five (5%) per cent. from United States Treasurer on sale of lands in Pawnee Indian reservation $6,275.47.

June 30th, 1884.—To amount received at 5 per cent. net proceeds on sale of lands within the limits of the State of Nebraska heretofore known as the Pawnee Indian reservation, received through Governor James W. Dawes, $17,495.95.

November 10th, 1886.—To five (5) per cent. on sales of U. S. Government lands, received from Governor James W. Dawes, $3,272.57.

[SEAL.] J. B. MESERVE, *State Treas.*

88 (*Copy Plaintiff's Exhibit "4."*)

(Refer in reply to this initial: M.) J. W. L. L. G. H. J. W.

1880–79977. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan'y 14th*, 1881.

Thomas P. Kennard, Esq., Washington, D. C.

SIR: I am in receipt of your communication of the 21st, ultimo, asking on the part of the State of Nebraska, that an account be stated between the United States and said State for the amount due the State arrising from five per cent. of the net proceeds of the sales of public lands included in Indian reservations within said State.

The 12th section of the act of Congress of April 19, 1864 (13 Stat. 47) "To enable the people of Nebraska to form "A constitution and State government," &c., provided, "That five per centum of the "proceeds of the sales of all public lands" lying within said State, which have been" or shall be sold by the United States" prior or subsequent to the admission" of

89 said State into the Union, after
"deducting all expenses incident to the
"same, shall be paid to the said State for
"the support of common schools."

The foregoing grant was confirmed by the act of February 9, 1867, "for the admission of the State of Nebraska into the Union." (14 Stat., 391.)

In the case of the claim of the State of Kansas for five per cent. of the net proceeds of the sales of lands embraced in Indian reservations lying within that State, the honorable First Comptroller of the Treasury, under date of May 6, 1880, decided as follows:

"Lands held by Indians in reserva-
"tions by the common Indian title are
"public lands. They will pass subject
"only to the Indian right of occupancy,
"by a grant of public lands by the
"United States; and in the absence of
"language evincing a different intent,
"a grant to a State by Congress of five
"per cent., of the proceeds of sales of the
"public lands within the State will be
"held to include five per cent., of the
"proceeds of sales of lands held by the common Indian title."

90 And the comptroller further decided that treaties made with Indian tribes after the admission of the State of Kansas, into the Union, stipulating that the net proceeds of the sale of such lands should be invested by the United States for the benefit of said tribes, and the acts passed by Congress carrying out the treaty provisions,

"Did not destroy the
"antecedent right of the State of Kansas
"to the five per cent., which had been granted
"when the United States, holding the fee
"in said lands, had capacity to make
"the grant, and made it without provision
"for any subsequent limitation."

The comptroller also decided that when the fee of any lands had been vested in the Indian prior to the admission of the State, or where the United States had engaged by treaty, prior to the admission of the State, that the proceeds of sale should be paid to the Indian occupants, the State was not in either case entitled to five per cent. of such proceeds.

The Indian reservations in the State of Nebraska which have become subject to sale by the United States since the date of the passage of the enabling act of April 19, 1864, are the Otoe and
91 Missouria, the Sac and Fox, and the Pawnee reservations.

In applying the principles of the Kansas decision to these reservations the following questions arise:

1st. Were the lands embraced in said reservation public lands of the United States at the date of the contract between the United States and the State of Nebraska?

2nd. Had the United States engaged by treaty prior to the admission of the State, or prior to the passage of the enabling act, that the proceeds of said lands should be paid to, expended for, or held in trust for the benefit of the Indian tribes?

Otoe and Missouria reservation.

The Otoe and Missouria reservation in the State of Nebraska was created by article one of the treaty of March 15, 1854, (10 Stat. 1038.) And the supplement, any treaty of Dec. 9, 1854 (10 Stat. 1130.)

Article six of the treaty of March 15, 1854 provided for the assignment in severalty to Indians of the confederated tribes, of land embraced in said reservation, and that

"The residue of the land
"hereby reserved, after all the Indian
92 "persons or families of such confederated
"tribes shall have had assigned to them
"permanent homes, may be sold for their
"benefit, under such laws, rules or
"regulations as may be hereafter provided
"by the Congress or President of the United
"States."

The supplementary treaty of December 9, 1854, related only to the boundaries of the reservation, which by said supplementary treaty were changed and accurately defined.

The acts of Congress providing for the sale of said reservation in accordance with the treaty stipulations are the acts of June 10, 1872,

and (17 Stat. 391), August 15, 1876 (19 Stat. 208,) and the amendatory act of March 3, 1879 (20 Stat. 471).

These acts provided that the net proceeds of the sale of the lands should be placed to the credit of said Indians, and the income expended for their benefit.

It will be perceived that prior to the admission of the State of Nebraska into the Union, and prior to the passage of the enabling act, the United States had engaged by treaty that the proceeds of these lands, when sold, should be applied to the benefit of the
93 Indians. Hence under the decision of the First Comptroller in the Kansas case, the State of Nebraska is not entitled, by virtue of the compact for admission into the Union, of five per cent. of the net proceeds of the sale of the said lands.

Sac and Fox reservation.

By the treaty of March 6, 1861 (12 Stat. 1171), the Sac and Fox Indians of Missouri ceded to the United States all their right, title and interest in and to the lands embraced in their reservation in the State of Nebraska.

The second article of said treaty provided for the survey and sale of said lands, and that the net proceeds of the sales, after deducting the expenses of surveying the lands and all other expenses incident to the negotiation of the treaty and the execution of its stipulations, should be applied to the benefit of the Indian parties in the manner provided by that and former treaties.

The acts of Congress carrying out the provisions of said treaty, and under which the lands have been and are now being sold, and the proceeds credited to the Indians, are the acts of June 10, 1872, August 15, 1876, and March 3, 1879 (17 Stat. 391—19 Stat. 208—20 Stat. 471).

94 The treaty engagement relative to the appropriation of the proceeds of the sale of these lands having been entered into by the United States prior to the admission of the State of Nebraska into the Union, said State is not under the decision in the Kansas case, entitled to five per cent. of said proceeds.

Pawnee reservation.

By the treaty of Sept. 24, 1857 (11 Stat. 729), the confederate bands of Pawnee Indians ceded to the United States their right, title and interest in all lands claimed by them, except certain lands described in said treaty which lands so excepted, constituted their reservation in the State of Nebraska. It was a condition of said treaty that if the Pawnees in conjunction with the United States agent, should be able to find a more suitable locality for their future homes within said cession, they should remove to such new homes within a certain time, without cost to the United States.

It does not appear that the selection of a new reservation within the ceded limits, and the removal of the Indians thereto, as contemplated by the treaty of 1857, was ever consum-ated.

The act of Congress of April 10, 1876 (19 Stat. 28), provided
95 for another and different reservation in the Indian Territory for said Pawnee Indians and that with the consent of said Indians their, reservation in the State of Nebraska should be sold, and the proceeds applied to reimburse the United States for moneys provided by the act to be appropriated for the subsistence of said Indians, their removal to and establishment in the Indian Territory, their further subsistence therein, and the expenses of the appraisement and sale of their reservation in Nebraska; the surplus remaining from said proceeds after such reimbursement, and after the purchase of the reservation in the Indian Territory to be credited to said Indians, and to be applied to their benefit as provided in the act.

At the period of the admission of the State of Nebraska into the Union, the lands in that State embraced within the Pawnee reservation were public lands of the United States, subject to the Indian right of occupancy. This right of occupancy having closed, and the provisions for the sale of the lands and the appropriation of the proceeds for the benefit of the Indians having been made subsequent to the admission of the State, I am of the opinion that, in accordance with the principles stated in the decision of the First Comp-
96 troller in the Kansas case, I am authorized to state an account between the United States and the State of Nebraska for five per cent. of such net proceeds under the compact for the admission of said State into the Union.

This account when stated will be transmitted to the First Comptroller of the Treasury for his final determination and action.

Very respectfully,

J. A. WILIAMSON, *Commissioner.*

97 (*Copy Plaintiff's Exhibit* "5.")

M EF BEST WEB

Address only the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* —, 1897.

Honorable J. B. Strode, U. S. House of Representatives, Washington, D. C.

SIR: I have received by reference from Honorable Thomas P. Smith, Assistant Commissioner of Indian Affairs, your letter of the 12th ultimo making sundry inquiries relative to the Pawnee Indian reservation in the State of Nebraska.

In reply thereto I have the honor to state that the records of this office show that the total receipts arising from the sales of Pawnee lands up to —— 30, 1896, amount to $876,148.47, and that all purchasers of said lands have paid in full, except $1.15 for interest due to error in computation by register and receiver.

The State has been paid the sum of $27,043.99, five per
98 centum of the net proceeds of lands embraced within said reservation up to June 30, 1883, since which time no adjust-

ments have been made or statements rendered in favor of the State on account of sale of Pawnee lands, or lands embraced in other Indian reservations lying within the State.

The general deficiency bill of March 2, 1889, provided "for payment to the State of Nebraska on account of five per centum fund arising from the sale of public lands in said State prior to June 30, 1886, as per decision of the First Comptroller of the Treasury and as stated by the Commissioner of the General Land Office, $35,500.00."

Although the act refers to five per centum on public lands it is understood by this office that the appropriation was intended to provide for five per centum of net proceeds of sale of Indian lands in Nebraska. The appropriation was covered to the surplus fund in the Treasury under First Comptroller's letter of June 8, 1891, with the statement that the appropriation was not estimated for, and the claim of the State had been otherwise paid.

Very respectfully, S. W. LAMBREAUX,
Commissioner.

99 (*Copy of Defendant's Exhibit "A."*)

Report and appeal
of
T. P. Kennard,
State agent for the
Prosecution and collection of claims
of the
State of Nebraska against
the United States,
made to the
Legislature of Nebraska
for payment of amount due.

Lincoln, Nebraska:
Jacob North & Co., printers.
1897.

To the honorable senate and house of representatives of the State of Nebraska:

Gentlemen of the senate and house of representatives of the State of Nebraska—I crave your indulgence and ask you to read and carefully investigate the following communication and facts
100 connected therewith. You will observe that the legislature, by act approved February 8, 1873, made it the duty of the governor of the State to appoint an agent to prosecute certain claims against the General Government, and to contract with said agent to furnish both time and money to carry into effect the object of the law. Robert W. Furnace, the governor, did me the honor to appoint me said agent and entered with me into the following contract:

STATE OF NEBRASKA, EXECUTIVE DEPARTMENT,
LINCOLN, *October* 15, 1874.

"That, whereas the legislature of the State of Nebraska "passed a joint resolution relative to the appointment of an "agent or agents for the collection of the amount due from the "United States to the State of Nebraska, on account of lands "in this State disposed of by the Indian reservations, military "land warrants, and land script issued for military services in "the wars of the United States, for agricultural college script,
"and for the recovery of swamp and overflowed lands due the
101 "State, approved February 8, 1873, a certified copy of which is
"hereto attached and made a part of this agreement;

"Now, therefore, in pursuance of the object and intent of "said joint resolution, and by the power and authority vested in "me by the same, I, Robert W. Furnace, governor of the State "of Nebraska, do by these presents, appoint as agent, Thomas "P. Kennard, and with him stipulate as follows: That in "consideration that the said Thomas P. Kennard shall diligently "and to the best of his ability prosecute and collect the claims "specified in said joint resolution, and upon the terms therein "specified and contemplated, he, the said Thomas P. Kennard, "shall have and be entitled to receive for his services, in the "premises, fifty per cent. of the amount so collected, the remaining "fifty per cent. (50) upon the amount so collected to be paid over

102 (2)

"to the said Robert W. Furnas, governor of Nebraska, or his "successor in office, for the use and benefit of the State of Ne- "braska, as by law in such cases made and provided:

"Provided, that it is hereby distinctly understood and "agreed that no charge shall be made to the State for any ex- "penses or services of whatever kind or nature in case of "failure to collect money or lands contemplated in the joint "resolution authorizing this contract; to all of which the con- "tracting parties agree, as witness their respective signatures, "the day and year above written.

"ROBERT W. FURNAS,
"[STATE SEAL.] *Governor of Nebraska.*
"THOMAS P. KENNARD.

"In presence of
"J. H. ALFORD."

"By the terms of this contract, and the acceptance of the "appointment, it became my duty to at once enter upon the
103 "prosecution of the claims, and diligently and faithfully ex- "pend whatever time, money, or energy was required to fairly rep-
"resent the State, and to reach and secure, if possible, results

"favorable to the State, under the trusts of my appointment
"imposed and accepted."

"Shortly after my appointment, I learned that the State of
"Iowa had passed a law similar to our own, and that the gov-
"ernor of said State had appointed as the agent of said State
"Hon. R. P. Lowe, ex-governor. I at once made a trip to
"Keokuk, Iowa, where he resided, and had a conference with
"him for the purpose of deciding as to the line of policy to
"pursue and for the purpose of securing concert of action.
"As a result we decided to open correspondence with the author-
"ities of other States having provisions in their enabling acts
104 "similar to ours, and through this means secure general co-op-
"eration of all the States interested in like questions.

"The claim for five per cent. on all military land warrants
"locations within the State coming under a clause of our enabling
"act, and the department at Washington refusing to entertain an
"application for settlement under it, it was decided to make an
"application to Congress for the passage of a law providing for
"the payment of this claim. Accordingly we had bills introduced
"into Congress, and have been trying every session since 1874 to
"secure the passage of the measure. For the last three sessions
"we have secured a favorable report from the committees of both
"house and senate, recommending the passage of the bills, and
"yet so far we have failed in securing their passage; but they
are
105 "now pending on a favorable report in both houses, and we
hope
"to secure their passage before the adjournment of the present
"Congress.

"There are eighteen States interested in this claim, having
"similar provisions in their enabling acts to our own, and I
"believe all of them now have agents to represent them in the
"prosecution of claims against the General Government.

"Thus you may see that in this branch of the case there has been
"nothing left undone that could suggest itself as in any way aid-
"ing success.

"In regard to the claim for indemnity for swamp or over-
"flowed land disposed of by the General Government, or for land
"scrip in lieu of the same, we have had the matter before Congress
"in every session since 1874, trying to get the laws under
which
106 "other States secured millions of acres of land and millions of
"money as indemnity extended to our own State, so that
whatever
"we might be under the laws affecting sister States, we might be
"put on a par with them. Thus far we have failed, and in the
"future we have no definite prospect of success.

"In regard to the claim for five per cent. on all permanent
"Indian reservations within the State, I beg to report as follows:

"Soon after my appointment as agent for the State, I went
"to Washington for the purpose of instituting proceedings for the

"collection of this claim. After spending time to familiarize
"myself with this matter, I had an interview with the Secretary
"of the Interior, who directed me to file my application with the
"accounting officer of the General Land Office. So I then filed in
"that office a claim of the State for five per cent. on all the
107 Indian
"reservations within the State, claiming that the Govern-
ment of
"the United States had by treaty disposed of this land to the
"Indians; and under an act of Congress, passed March 2, 1855,
"with reference to Arkansas, and supplemented by act of Congress
"March 3, 1857, with reference to Mississippi, I claimed that the
"department should pay to the State five per cent. on the entire
"amount of Indian reservations within the State, on a valuation
"of $1.25 per acre, and counting the entire acreage contained
"within the reservations of the State.

(4)

"I filed with this application a printed argument, a copy of
"which is attached to this report.
"I could not get a hearing on my application at that time,
108 "and I came home. After remaining at home for some
time, I
"returned to Washington and got the matter called up, made an
"oral argument, and after waiting for a decision,
"it was rendered adverse to the State, from which decision I at
"once took an appeal to the Secretary of the Interior. I remained
"in Washington nearly all winter, endeavoring to get a decision
"on the matter, and also in conjunction with Mr. R. P. Lowe,
"agent for Iowa; General Sanborn, agent for Minnesota; and Mr.
"Howe, of Wisconsin, and other agents trying to get favorable
"action of Congress on our five per cent. military land warrant
"bill. After the Secretary had held the appeal some three
"months or more, without any notice to me he sent it to the
"Attorney General of the United States for a decision. There I
"left it and returned home again, and after a long time the
109 Attor-
"ney General made a decision, and it was adverse to the
State,
"and sent the claim back to the Interior Department.
"This decision was rendered on the precedents already set,
"and those very precedents I was attempting to overthrow, know-
"ing they stood in the way of success.
"On receiving notice of this decision I again returned to
"Washington and made an application to the Secretary of the
"Interior to have the case of the State of Nebraska for settlement
"with the United States referred to the solicitor of the Interior
"Department, to be heard upon its legal merits as an original
"case outside of precedents. It was so referred; and after wait-
"ing for a long time, as such matters always have to wait in the

"departments, I finally got a day set for hearing, previous to
110 "which I filed another written argument, and on the day set for
"hearing both Senator Hitchcock and the Hon. Lorenzo Crounse
"appeared before the solicitor and — oral arguments in favor of
"the legality and equity of the claim. Soon after this the solic-
"itor rendered his decision, and after fully reviewing the merits
"of the case, he sustained the case, and upon his decision the
"Secretary of the Interior ordered the department to state the
"account. And after a long time consumed in unwinding red
"tape, and some little time in business, at last the account was
"stated and given to me, amounting to a little over fifty-eight
"thousand dollars; and I supposed my labors on this claim vir-
"tually closed by success. I presented the matter to the Treasury
"Department, and was referred to the Comptroller of the Treas-
ury,
111 "as he must first pass the claim. Then it remained in his office
"some two or three weeks before I could get the matter taken up
"at all; and when I finally did succeed, it was to be told by the
"comptroller that he had some doubt of the legality of the claim,

(5)

"and if he made a decision it would be adverse to the State. And
"as from his decision there would be no appeal, I asked him to
"hold the question and render no decision. This he agreed to do,
"and put the case in a position to call it up if I wished to in the
"future at any time. Then this matter remained in his office
"until the Hon. A. S. Paddock, after his election as U. S. Senator,
"in an interview with the comptroller, got the impression that if
"the case was called up he would make no decision in favor of the
"State. Against my judgment, but yielded to him, as I was
112 not
"on the grou-d, I authorized him to call up the case, and as I
"anticipated, a decision was rendered against the State, and the
"case sent back to the Interior Department, upon the theory that
"the land had not yet been disposed of.

"Thus I seemed to be at the end of all my effort, after spend-
"ing an immense amount of both time and money, resulting in
"failure. So the matter remained until the passage of the law
"for the sale of the Pawnee Indian reservation, and the Otoe
"reservation I at once made my arrangements to renew my
"attempt to collect for the reservations, and on the 21st day of
"December, 1880, I again filed an application in the Interior
"Department, but changing the form of my claim and making it
"for five per cent. of the amount realized for the land sold, in-
stead
113 "of estimating them at one dollar and twenty-five cents per acre,
"as in my former application.

"On the 14th day of January, 1881, a decision was rendered

"by the department on my application in favor of the State, so
"far as the Pawnee reservation, but against the State on all other
"reservations, which decision is wrong, I am satisfied, so far at
"least as one other reservation is concerned.

"On this decision an account was started by the accounting
"office and sent to the Treasury for payment, and I was notified
"by the comptroller that the account had been received and
"passed amounting to $6,255.47, which embraced all up to the
"first of July, 1880, due the State on account of five per cent. on
"sales of Pawnee Indian reservation. But I was informed fur-
"ther that as the State of Nebraska was indebted to the General
114 "Government in the sum of $19,312.00 on account of direct
taxes
"due from the former Territory of Nebraska to the United States,
"under the law of Congress, approved August 5th, A. D. 1861, he
"the comptroller, had directed the amount so found due to be
"covered into the Treasury of the United States and credited to
"the State of Nebraska.

"I was informed soon after that a warrant for $4,282.60 had
"been issued and credited to the State and deposited in the U. S.
"Treasury, the amount exhausting the appropriations of the
"United States for that purpose. This left $1,993.47 which the
"comptroller said would be covered into the Treasury, and cred-

(6)

"ited to the State as soon as an appropriation was made available
"for that purpose. To all which proceedings of the comp-
troller,
115 "through R. P. Lowe, my attorney, I took exceptions. I
wrote
"Senator Saunders, and also E. K. Valentine, and received
"notice that as the State seemed indebted to the General Govern-
"ment in the sum claimed they did not see any escape from it.
"In my correspondence with Mr. Lowe, I informed him that
"I had decided impressions that in some way the State of Ne-
"braska had paid its direct tax, but could not find anything in
"either State or United States statutes or any reports to make
"the matter plain. Finally Mr. Lowe, after a great deal of re-
"search, found that by the act of Congress, sec. 12, Statutes of
"the United States at Large, page 446, the Territory of Nebraska,
"by and in consideration of her paying her legislative expenses
"for the year 1863, she was entitled to have and receive credit
116 "on the books of the Treasury of the United States for the
"amount of the direct tax charged to the Territory. By
some
"unaccountable oversight, the matter still remained on the books
"of the General Government, and after nearly twenty years all
"parties had lost sight of the matter except the charge originally
"made on the Treasury books.

"Through the assistance of Mr. Lowe, acting as my attorney
"then in Washington, we were at last able to show by statements

"from the comptroller, in connection with the law above referred
"to, that the State of Nebraska, had complied with the law and
"should have credit on the books of the Treasury for the amount
"standing against it. So within a few days of the adjournment
"of Congress, Mr. Lowe was able, through the courtesy of Mr
117 "Allison, Chairman of Committee *in* Finance of the Senate, to get
"the following amendment engrafted upon the sundry civil bill,
"then pending in the Senate, which was passed and became a law.
"To enable the Secretary of the Treasury to adjust the ac-
"count of the Territory of Nebraska for direct tax laid upon the
"Territory under the provisions of the act of August 5, 1861, and
"to pay to the State of Nebraska an amount certified to be due on
"account of five per centum of net proceeds of sales of Indian
"reservations within the limits of said State during the period
"commencing January 1, 1878, and ending June 30, 1880, he is
"hereby authorized and directed to credit said Territory with the
"sum of $15,030.40, now standing against it on the books of the
"Treasury on account of direct tax, and pay the said State of
118 "Nebraska the sum of $4,281.60, the balance certified by the ac-
"counting officers to be due said State on account of five per
"centum of net proceeds of sale of Indian reservations, which
"sum is hereby appropriated out of moneys in the Treasury not
"otherwise appropriated.

(7)

"It will be seen by this that the State does not only receive
"an appropriation of the amount covered into the Treasury of
"the United States by the wrongful act of the comptroller, but
"the Treasury Department is authorized to credit the State of
"Nebraska with the full amount outstanding on the books against
"the State of $19,312, and also the amount found due on account
"of sales of Indian reservations, which includes the amount not
"already covered into the Treasury but standing due the State. I
119 "was then notified that the entire amount of $6,275.47 was ready
"to be paid to me on my application; but as your honor declined
"to give me power of attorney to sign vouchers, I ordered the
"drafts to be sent to you.

"Your honor is familiar with the history of the case and my
"connection with it thereafter—of the receipt of the drafts for the
"amount of $6,275.47, with my application to you for fifty per
"cent. of said amount, to wit: $3,137.73, which I was entitled to
"receive under my contract with the State. Your declining to
"allow me to receive the said amount, and depositing of the
"entire amount in the State treasury, leaving me without remedy
"except by an appropriation of the legislature, to reimburse me
"for all my time, money, and energy expended in behalf of the

"State, I have thought proper to enter into detail some-
120 what with
"reference to my action under my appointment and contract
with
"the State, in order to show that I have not been idle in this
"matter, but have done what the State had a right to expect me
"to do, that is, to put my time, money, and energy freely into the
"prosecution of these claims, making six trips to Washington,
"two trips to Kansas, two to Iowa, spending in all up to this time
"more than one year of time and over three thousand dollars in
"cash out of my pocket, and as a result collecting this amount,
"first from the department, then having it covered back into the
"Treasury of the United States: then by act of Congress having
"the State indebtedness removed and the State credited with
"$19,312 standing against it for nearly twenty years, under and
"which was covered into the Treasury and the amount
121 of $6,-
"275.47 directed to be paid to the State, and when it reached
"here have it deposited in the State treasury."

The foregoing is an extract from my report to His Excellency Gov. Nance, and by him referred to the legislature for action. By reference to the reports of the attorney general and auditor of public accounts as well as the message of Governor Dawes at that time, you will see they all recognized the legality and equity of my claim and recommended its payment.

It will be observed that at that time I had performed all the labor and expended the time and money necessary to secure the decision, which was virtually a judgment in favor of the State for the entire amount, which will be ultimately paid to the State,

(8)

under the direction of the department, on account of the sales of the Pawnee lands.

But the payment to the State comes in installments, as the reservation was sold on time, to be paid in payments, and as those payments are collected by the General Government, it pays to the State the five per cent. upon the net proceeds of said sales. And
122 as at that time there had only been paid over to the State $6,275.47, that session of the legislature, recognizing my legal right as well as the State's obligation under its contract with me, reported a bill making an appropriation of $3,137.73, being the amount I was entitled to under my contract up to that time.

This bill passed both house and senate by almost unanimous vote, after being thoroughly investigated by the judiciary committee in each house, but by neglect of the secretary of the senate it was not presented to the proper officers for their signatures and thus failed to become a law.

By statements in my hands from the General Land Office at Washington, I am informed that the gross sales of the Pawnee reservation amounted to the sum of $876,148.47—five per cent. of which

amount, $43,807.42, would be the amount due the State less the cost of selling said land, estimated by the department to be about five per cent. I am also informed by the Commissioner of the General Land Office that there has been paid to the State on said five per cent. $27,043.99, up to and including the fiscal year ending June 30, 1883.

123 I am also informed that during the fiscal year ending June 30, 1884, the amount accruing and due the State was $4,274.38, making the amount which the State has received under and by virtue of said decision, made by the department in answer to my efforts under my contract, $31,318.37.

From the foregoing statements it must be evident that there is yet due the State from this source over $10,000.00, the amount of which I have taken steps to ascertain and secure its payment, which I hope may be done before the adjournment of this legislature, thereby increasing my claim in one-half the additional amount which may be paid.

By this statement it will be seen that the State has now in its treasury $31,318.37, the result of my work, time, and money expended under my contract authorized by law, which gives me one-half collected, and makes the State my debtor to the amount of $15,659.18.

My only remedy is an appeal to the legislature for an appropriation of that amount to reimburse me for money and time expended, the result of which the State is now in full enjoyment. I trust and believe the appeal will not be in vain, for the State can afford to be honest with its citizens and fulfil its contracts, as I have fulfilled mine.

T. P. KENNARD,
State Agent.

124 In the District Court of Lancaster County, State of Nebraska.

THOMAS P. KENNARD, Plaintiff,
vs.
THE STATE OF NEBRASKA, Defendant.

And the defendant in the above-entitled cause in the district court of Lancaster county, third judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose, reduced to writing in this its proposed bill of exceptions, all of the testimony adduced or offered on both sides of the before-named cause in the before-named court; all of the objections, with the grounds therefor, made to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions to such rulings, made and taken at the time, and having served the same on the attorneys for the above-named plaintiff, according to law, for examination and amendment; and the same being now here before me, the undersigned judge, before whom said cause was tried, on the motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed and made a part of the
125 record in the said cause in the said court. Now I, the said judge,

Do hereby certify, that this bill of exceptions contains all of the evidence adduced or offered by the plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time, and I,

Do hereby order, that it be made a part of the record in the said cause, in the said court.

Done at Lincoln, Nebr., this 14 day of April A. D. 1898.

ALBERT J. CORNISH,
Judge District Court.

I, Sam. E. Low, clerk of the district court of Lancaster county, in the third judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause.

In testimony whereof, I hereunto set my hand and affix the official seal of said court, this 15th day of April, A. D. 1898.

[Seal District Court of Lancaster County, Nebraska.]

SAM. E. LOW, *Clerk D. C.*,
By J. H. MALLALIEU. *Deputy.*

126 I hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the above cause, at the February term, 1898, of the district court of Lancaster county, Nebraska.

MINOR S. BACON,
Special Reporter.

Reporter's fee $12.15.

127 [Endorsed:] 10322. The State of Nebraska *v.* Thomas P. Kennard. Bill of exceptions. Supreme court of Nebraska. Filed Sep. 2, 1898. D. A. Campbell. E. A. Clerk's office district court. Filed Apr. 15, 1898. Sam. E. Low, clerk district court.

128 In the Supreme Court of the State of Nebraska.

THOMAS P. KENNARD, Plaintiff in Error,
vs.
STATE OF NEBRASKA, Defendant in Error. } Petition in Error.

To the Honorable David J. Brewer, justice of the Supreme Court of the United States:

Your petitioner, Thomas P. Kennard, respectfully shows:

1. That on the 4th day of January, 1900, judgment was rendered against him in the above-entitled cause in the supreme court of the State of Nebraska, which judgment is final and the court rendering the same is the highest court in said State in which a decision of said cause can be had.

2. That in the rendition of said judgment by the said court there was drawn in question the construction of the statutes of the United States with reference to the lands of the Pawnee Indian reservation

located in the State of Nebraska, and the act of Congress authorizing the admission of the State of Nebraska into the Union passed Apr. 19, 1864, and found on page 97 of 13 U. S. Statutes at Large, and the decision of said supreme court was against your petitioner in such construction.

3. The said decision was necessary to the judgment given by the said supreme court and without such decision and construction the said judgment could not have been given.

Wherefore your petitioner prays the allowance by your honor of writ of error to remove the records and proceedings of the said court into the Supreme Court of the United States for its revision thereof and for the citation directed to the said State of Nebraska for its appearance in said Supreme Court.

A. S. TIBBETS,
Attorneys for Petitioner.

[Endorsed:] 11125. Thomas P. Kennard *v.* The State of Nebraska. Petition in error. Supreme court of Nebraska. Filed Jan. 31, 1901. Lee Herdman, clerk.

129 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas P. Kennard, plaintiff in error, and The State of Nebraska, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn
130 in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same in the said

preme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of January, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

131 THE STATE OF NEBRASKA, *ss:*

In obedience to the command of the within writ, I, Lee Herdman, clerk of the supreme court of said State, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, assignment of errors, writ of error, copy of bond, and citation and proof of service.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 31st day of January, A. D. 1901.

LEE HERDMAN, *Clerk.*

{ Ten cent United States internal-revenue stamp, canceled 1, 31, '01. Lee H. }

[Endorsed:] No. 11125. Thos. P. Kennard *v.* The State of Nebraska. Writ of error. Supreme court of Nebraska. Filed Jan. 31 1901. Lee Herdman, clerk.

132 UNITED STATES OF AMERICA, *ss:*

To the State of Nebraska, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Nebraska, wherein Thomas P. Kennard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 17th day of January, in the year of our Lord one thousand nine hundred and one.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

133 I hereby accept service of the within citation this 30th day of January A. D. 1901.

F. N. PROUT,
Attorney General for The State of Nebraska, Def't in Error.

[Endorsed:] In the supreme court of the State of Nebraska. 11125. Thomas P. Kennard *v.* The State of Nebraska. Citation. Supreme court of Nebraska. Filed Jan. 31 1901. Lee Herdman, clerk.

134 In the Supreme Court of the State of Nebraska.

THOMAS P. KENNARD, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error. } Supersedeas Bond.

Know all men by these presents, that we, Addison S. Tibbets and Thomas S. Allen are held and firmly bound unto the above-named State of Nebraska in the full and just sum of one thousand dollars, ($1,000.00) to be paid to the said State of Nebraska and — which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Dated this 17th day of January, 1901.

Whereas, lately at a term of the above-named court and in a suit depending therein between the above-named State of Nebraska, as plaintiff and said Thomas P. Kennard, as defendant, judgment was rendered against the said Thomas P. Kennard, he having prayed and obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit: and a citation directed to the said State of Nebraska citing and admonishing it to be and appear at the Supreme Court of the United States to be held at Washington the — day of —— next.

Now the condition of the above obligation is such that if the said Thomas P. Kennard shall prosecute his said writ to effect and answer all costs, if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ADDISON S. TIBBETS.
THOMAS S. ALLEN.

Sealed and delivered in the presence of—
ALBERT WATKINS.

Approved by me,
LEE HERDMAN, *Clerk*,
By E. W. NELSON, *Deputy*.

Approved:
DAVID J. BREWER,
Associate Justice Supreme Court U. S.

135 THE STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of said State, do hereby certify the foregoing to be a true copy of a certain supersedeas bond filed in an action lately pending in said court, wherein Thomas P. Kennard was plaintiff, and The State of Nebraska was defendant as the same appears of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 31st day of January, A. D. 1901.

LEE HERDMAN, *Clerk*,
By E. W. NELSON, *Deputy*.

{ Ten cent United States internal-revenue stamp, canceled 1, 31, 1901. L. H. }

136 [Endorsed:] Supreme court, State of Nebraska. Thomas P. Kennard *v.* The State of Nebraska. Copy of supersedeas bond.

137 STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the case of The State of Nebraska, plaintiff in error, *versus* Thomas P. Kennard, defendant in error, and Thomas P. Kennard, plaintiff in error, *versus* The State of Nebraska, defendant in error, including the record and proceedings in the district court, the bill of exceptions and the record and proceedings in the supreme court, as the same remains fully on file and of record in my office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 26th day of February, A. D. 1901.

[Seal Supreme Court of Nebraska.]

LEE HERDMAN, *Clerk*.

137½ [Endorsed:] 11125. Kennard *v.* State. Bill of exceptions. Supreme court of Nebraska Filed Dec. 15, 1899. D. A. Campbell, clerk.

[Endorsed:] 11125 Thos. P. Kennard appellant *v.* State of Nebraska appellee.

[In pencil:] From G. S. Allen, Lincoln, Neb.

Endorsed on cover: File No. 18,065. Nebraska supreme court. Term No. 261. Thomas P. Kennard, plaintiff in error, *vs.* The State of Nebraska. Filed March 1st, 1901.

IN THE SUPREME COURT OF THE UNITED STATES.

THOMAS P. KENNARD, Appellant,
vs.
THE STATE OF NEBRASKA, Appellee.
} Appeal from the District Court of Lancaster County. # 11125.

Be it remembered that on the 15th day of December, 1899, there was filed in the office of the clerk of said court a transcript of the proceedings in the above-entitled cause, bill of exceptions and voluntary appearance of the appellee, the same as appears hereafter of record.

And afterwards, to wit: on the 4th day of January, 1900, said cause was argued and submitted and there was rendered by the court and entered of record a certain judgment in words and figures as follows, to wit:

This cause came on to be heard upon the record, on consideration whereof the court finds there is no error apparent on said record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be and the same is affirmed; that the defendant in error recover of the plaintiff in error its costs taxed at $3.60 and that a mandate issue accordingly.

STATE OF NEBRASKA, *ss:*

I, Lee Herdman, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a true transcript of the record in the case of Thomas P. Kennard, appellant, *vs.* The State of Nebraska, appellee, so far as shown by the above record and as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of said court at the city of Lincoln this 25th day of April, 1902.

[Seal Supreme Court, State of Nebraska.]

LEE HERDMAN,
Clerk of the Supreme Court.

In the Supreme Court of the United States.

THOMAS P. KENNARD, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.
} # 18065.

It is hereby stipulated and agreed by and between the parties to the above-entitled action, that the above record may be incorporated and entered as a part of the record in the above-entitled cause at

the foot of page 14 of the printed record and after page 26 of the original record in said cause and that the same shall be considered as incorporated into said record.

THOMAS P. KENNARD,
By A. S. TIBBETS, *His Attorney.*
STATE OF NEBRASKA,
By F. N. PROUT, *Att'y General.*

[Endorsed:] File No. 18,065. Supreme Court U. S., October term, 1901. Term No. 261. Thomas P. Kennard, pl'ff in error, *vs.* The State of Nebraska. Stipulation of counsel and addition to record. Filed May 2d, 1902.

No. 261.

Brief of Tibbets & Co.

Filed APR 7 1902

JAMES H. MCKENNEY, Clerk

Filed in the 7, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901

No. 261

THOMAS P. KENNARD,
Plaintiff in Error,
v.
THE STATE OF NEBRASKA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

A. S. TIBBETS,
Attorney for Plaintiff in Error.
F. N. PROUT, ATTORNEY GENERAL,
NORRIS BROWN, DEPUTY,
Attorneys for Defendant in Error.

JOURNAL-GAZETTE PRINTING CO., LINCOLN

In the Supreme Court of the United States.

OCTOBER TERM, 1901
No. 261

THOMAS P. KENNARD,
Plaintiff in Error,
v.
THE STATE OF NEBRASKA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

A. S. TIBBETS,
Attorney for Plaintiff in Error.
F. N. PROUT, ATTORNEY GENERAL,
NORRIS BROWN, DEPUTY,
Attorneys for Defendant in Error.

STATEMENT.

Section 12 of the Enabling Act, under which the State of Nebraska was admitted into the Union as a State, passed

by Congress April 19th, 1864, 13 U. S. Statutes at Large, pg. 47 is as follows:

> "AND BE IT FURTHER ENACTED: That five per centum of the proceeds of the sales of all public lands lying within said State, which have been or shall be sold by the United States prior or subsequent to the admission of said State into the Union, after deducting all expenses incident to the same, shall be paid to the said State for the support of common schools."

At the session of the State Legislature of 1873 the following joint resolution was passed:

> "Joi[illegible] resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska, on account of lands in this State disposed of by Indian reservations, military land warrants, and land-scrip issued for military services in the wars of the United States, for agricultural college scrip, and for the recovery of swamp and overflowed lands due the State.
>
> Be it enacted by the Legislature of the State of Nebraska:
>
> That the governor be, and he hereby is, authorized and empowered to appoint an agent or agents in behalf of this state, to prosecute to final decision before congress, or in the courts, the claim of this state for the five per cent. due to the same from the United States, upon the land of this state disposed of by Indian reservations, and by the location of military land warrants, and land-scrip, issued for military service in the wars of the United States, and for agricultural college scrip, and railroad land; and,
>
> Whereas, The government of the United States has allowed various states large amounts of swamp and overflowed lands lying within their borders; and,
>
> Whereas, No such allowance of swamp and

overflowed lands has ever been received by this state for the large area of land lying within its limits subject to overflow: now, therefore,

Be it resolved by the Senate and House of Representatives of the State of Nebraska, That the governor is hereby authorized and empowered to appoint a competent and reliable agent or agents as provided in section one of this act, and that said agent or agents shall receive such compensation from said lands or money, as may be agreed upon by said agent or agents and the governor, conditioned that the state shall be put to no expense whatever, unless said agent or agents shall be successful in whole or in part in securing the aforementioned claims: Provided, That the foregoing shall in no wise apply to the five per cent. cash school fund accruing to the State.

Approved, February 8, 1873."

In pursuance with the above resolution the Governor of the State of Nebraska made with the plaintiff in error, the following contract:

"State of Nebraska, Executive Department,
Lincoln, October 15, 1874.

That whereas the legislature of the State of Nebraska passed a joint resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska, on account of lands in this State disposed of by the Indian reservations, military land warrants and land scrip issued for military services in the wars of the United States, for agricultural college scrip and for the recovery of swamp and overflowed lands due the state approved February 8, 1873, a certified copy of which is hereto attached and made a part of this agreement:

Now therefore in pursuance of the object and intent of said joint resolution and by the power and authority vested in me by the same, I, Robert W. Furnas, governor of the State of Nebraska, do by these presents appoint as agent Thomas P. Kennard and with him stipulate as follows: in consideration that the said Thomas P. Kennard shall diligently and to the best of his ability prosecute and

collect the claims specified in said joint resolution and upon the terms therein specified and contemplated, he, the said Thomas P. Kennard, shall have and be entitled to receive for his services in the premises fifty per cent. of the amount so collected, the remaining fifty per cent. upon the amount so collected to be paid over to the said Robert W. Furnas, governor of Nebraska or his successor in office for the use and benefit of the State of Nebraska, as by law in such cases made and provided. Provided that it is hereby distinctly understood and agreed that no charge shall be made to the State for any expense or services of whatever kind or nature in case of failure to collect money or lands contemplated in the joint resolution authorizing this contract; to all of which the contracting parties agree as witness their respective signatures the day and year above written.

(State Seal) ROBERT W. FURNAS,
Governor of Nebraska.
THOMAS P. KENNARD.

In presence of J. H. Alford."

Under this contract the plaintiff in error prosecuted the claim of the State, before the Department of the Interior at Washington, against the general government for an allowance of moneys that the State would have received under the five per cent. provision of the Enabling Act, in case certain lands had been sold by the government, instead of being "disposed of by Indian reservations and by the location of military land warrants and land scrip issued for military service in the wars of the United States and for agricultural college scrip and railroad lands." On the 14th of January, 1881, the plaintiff in error obtained from the Department of the Interior a decision, awarding to the state five per cent. of the proceeds of the sale of the lands of the Pawnee Indian Reservation, consisting of lands within the limits of the State of Nebraska. Under this decision, prior to June 11th, 1884, there was paid over to the State by the general government the sum of $27,043.99.

The warrants by which the transfer was made to the State of the several sums which made up this amount, were drawn in favor of the governor of the State. The Governor turned all the money received over to the State Treasurer, the State law providing that all money received by any state officer for the state shall by such officer be turned into the State treasury. After the money was once in the State treasury the plaintiff in error could obtain his share of it only by an appropriation by the State Legislature. After several unsuccessful attempts to obtain such appropriation, a resolution was passed by the house, March 26, 1897, authorizing plaintiff in error to bring suit against the State to determine the validity of his claim and the amount due thereon. The action was commenced in the District Court of Lancaster County, Nebraska, May 29th, 1897, issues joined, trial had, and judgment rendered in favor of Kennard and against the State for $13,521.99. The State appealed the cause to the Supreme Court of the State; briefs were filed, cause argued and submitted, and October 5th, 1898, an opinion was filed by the Court reversing the judgment of the lower Court. This opinion is found on page 7 and following of the record. Upon application of Kennard, a rehearing was granted and had, and February 9th, 1899, another opinion was filed, setting aside the judgment of the lower Court. This opinion is found on page 19 of record, pg. 11 of printed record, and as it is important in the consideration of this case, we here give it in full.

STATE V. KENNARD.

(Supreme Court of Nebraska. Feb. 9, 1899).

Public Lands—Pawnee Reservation—Title—Grant to State.

1. At the time of the admission into the Union of the state of Nebraska, the lands therein occupied in common by

the Pawnee Indians, and known as the "Pawnee Indian Reservation," were public lands, within the meaning of section 12 of the act of congress known as the "Enabling Act" (13 Stat. 47).

2. The fee-simple title to said lands at said time was in the United States, incumbered only with the right of said Indians to occupy the same.

3. By section 12 of said enabling act, congress granted to the state of Nebraska 5 per cent. of the proceeds arising from the sale of said lands, which took effect upon the extinguishment of the Indians' right of occupancy and the sale of the lands by the United States.

4. State v. Kennard, 76 N. W. 545, 55 Neb.—, reaffirmed.

(Syllabus by the Court.)

On rehearing. Reversed.

C. J. Smyth, Atty. Gen., Ed. P. Smith, and W. D. Oldham, Dep. Attys. Gen., for plaintiff in error. Tibbets Bros., Morey & Ferris, and Talbot & Allen, for defendant in error.

RAGAN, C. This is a rehearing of State v. Kennard, 55 Neb. —, 76 N. W. 545. By section 12 of the enabling act passed by congress April 19, 1864, (13 Stat. 47), the United States donated to the state of Nebraska 5 per cent. of the proceeds of sales of all public lands lying within the state of Nebraska which had prior to that time been sold or which should subsequently be sold by the United States, after deducting expenses incident to such sale. At the time the state was admitted into the Union a tribe of Indians, known as the "Pawnees," occupied in common, a tract of lands in

this state known as the "Pawnee Indian Reservation." After the state was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto, and in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States treasury, to the credit of the Indians. By an act passed by the legislature of the state of Nebraska in February, 1873 (see Gen. St. 1873, c. 59), it seems that the legislature was of opinion that by reason of section 12 of the enabling act the United States was indebted to it for 5 per cent. of the value of the lands lying within the state, used as Indian reservations, and 5 per cent. of the value of all lands on which private parties had located military land warrants and land scrip issued for military service in the wars of the United States, and 5 per cent. of the value of all such as had been donated by the United States to railroads. It is also recited in said act that the United States had donated to other states swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this state; and it seems to have been the opinion of the legislature that all the swamp and overflowed lands lying within the state belonging to the United States should by it be donated to the state and the act under consideration authorized the governor to employ an agent, in behalf of the state, to prosecute to final decision before congress or in the courts the claim of the state of Nebraska against the United States for the 5 per cent. of the value of the lands disposed of by the United States for any of the purposes already mentioned, and for the purpose of procuring from the United States a

donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the 5 per cent. cash school fund which had been donated to the state by the United States by section 12 of the enabling act aforesaid. The governor of the state entered into a contract with Kennard, in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the state against the nation in conformity with the act of the legislature, and that the state should pay him one-half of all moneys, except such cash school fund, he should collect for the state as such agent. Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the secretary of the Interior to acknowledge that the United States were indebted to the state of Nebraska in the sum of 5 per cent. of the proceeds of the sale of the Pawnee Indian reservation lands made by the United States subsequent to the admission of the state into the Union; and, in pursuance of this decision of the secretary of the interior, the United States paid into the treasury of this state $27,000. Mr. Kennard, by permission of the legislature, then brought this suit to recover one-half of that sum. He had judgment in the district court of Lancaster County, and the state brought the same here for review, and the judgment of the district court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the Pawnee Indian reservation were public lands, within the meaning of section 12 of the enabling act, and that the only money collected by Mr. Kennard was the 5 per cent. of the proceeds of the sale made of these lands by the Unit-

ed States, and by the terms of his contract he was not to have any compensation for collecting these moneys. Counsel for Mr. Kennard so strenuously insisted that we were wrong in this conclusion, that we granted a rehearing. We have again examined the question, with the result that we adhere to our former conclusion.

In 1873 the Great and Little Osage Indian tribes occupied certain lands in common in the state of Kansas. The lands occupied by them were known as "Indian Reservations." In that year congress passed an act (sec. 12 Stat. 772) in and by which it granted to the state of Kansas, to enable a railroad to be constructed between certain points, each alternate section of land, designated by odd numbers, for 10 sections in width, on each side of said railroad, as it should be located. The legislature of the state of Kansas accepted this grant, and designated the Leavenworth, Lawrence & Galveston Railroad Company to construct the road and receive the grant of land. The railroad company constructed the road, and received from the state of Kansas patents for the alternate sections of this land within these Indian reservations. The United States then brought ejectment against the railway company for the lands lying within the Indian reservations, which had been conveyed to the railway company by the state of Kansas; and the supreme court, by a divided opinion, held that the act of congress granting to the state of Kansas the alternate sections of land within 10 section of this railroad did not vest the state of Kansas with any lands within the Indian reservation. It was conceded that the fee-simple title to the Indian reservation lands was in the United States, and that the only title of the Indian was the right to occupy; and because the United States were not invested with possession and the right to

possession, as well as the fee, the court held that the grant did not embrace the lands within the reservations. The principal upon which the case was decided was that all grants are to be strictly construed against the grantee, that nothing passes except what is conveyed in clear and explicit language, and that, strictly construing the act of congress, it would not be held that the United States intended to convey what it did not own, namely, both title and seisin. Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 753. This conclusion of the court was reached notwithstanding the fact that, on the same day the act donating these lands to the state of Kansas passed, another act of congress went into effect, authorizing the president, by treaty or otherwise, to extinguish the rights of these Osage Indians to the lands in their reservation, and that subsequently the title of these Indians to these lands was extinguished, the lands put upon the market and sold by the United States, and the proceeds placed in the United States treasury, to the credit of the Indians. In 1864 certain tribes or bands of Sioux Indians occupied in common certain lands in what was then known as "Dakota territory," and, by an act of congress passed in July of that year (13 Stat. 365), congress granted to the Northern Pacific Railway Company each alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of its line of railway, as the same was to be constructed between Lake Superior and Puget Sound. The railroad, as constructed, passed through the lands occupied by these Sioux Indians; and it claimed that the act of congress vested in it the title to these alternate sections of land lying within these Sioux reservations. On the other hand, it was contended that at the time the grant to the Northern Pacific went into effect the United States were not in possession of both the fee title and the

possession and right to possession of these Indian lands, that the grant should be strictly construed, and that the act could not be interpreted to mean that the United States granted the railroad company what it did not own; and the case in 92 U. S., just referred to, was relied upon to support that contention. But the national supreme court held that by the act of congress the United States donated to the railroad company all the right and title which it (the United States) had in those lands. Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. 100. This Northern Pacific Railroad Case virtually overruled the case in 92 U. S. The doctrine, then, of the supreme court of the United States, is that all Indian lands,—all lands occupied in common by the Indians —whether these lands be reservations or not, are public lands, the fee-simple title to which is in the United States; that the Indian is but the ward of the nation, and his only interest or title to the lands of which he is in possession is the right to occupy. We think, therefore, that when Nebraksa was admitted into the Union the lands of the Pawnee Indian reservation were public lands,—the fee-simple title was in the United States,—and the Indians had only the right of occupancy in those lands, and that an absolute grant by congress to the state of all public lands within her borders would have invested the state with the title to the lands of the Pawnee Indian reservation, incumbered only with the Indian's right of occupancy. The United States, then, by paying into the state treasury, at the request and solicitation of Mr. Kennard, 5 per cent. of the sale of these Indian reservation lands, was simply performing the grant made by the nation to the state by section 12 of the enabling act, as by the grant the United States promised to pay to the state, not only 5 per cent. of the proceeds of all public lands lying within the state, and which had prior to that

time been sold by the United States, but also to pay to the state 5 per cent. of the proceeds of all public lands lying within the state which might after the date of the grant be sold by the United States. The fact that the United States sold these lands, and put the money to the credit of the Pawnee Indians, is not a consideration of any importance in determining whether these Pawnee Indian reservation lands were public lands, within the meaning of the enabling act. The thing of controlling importance is that the fee-simple title to these lands was in the United States. They were therefore public lands, and the promise was that when sold by the owner, it would pay 5 per cent. of the proceeds of the sale to the state. What the United States did with the money derived from the sale of those lands is unimportant. The judgment of the district court is reversed. Reversed."

This cause was by the Supreme Court remanded to the District Court for further proceedings. The case was formally subsequently tried in the District Court, upon the same pleadings and evidence as upon first trial, judgment rendered against plaintiff and in favor of defendant October 7, 1899; plaintiff appealed and cause again appeared in Supreme Court for final formal judgment, where it appeared upon the same pleas and evidence, as before, and judgment rendered January 4th, 1900. A writ of error was then permitted to issue from this Court.

ASSIGNMENTS OF ERROR.

The sole and only assignment for the consideration of this Court is found in the Petition in Error, pg. 128 record, pg. 61 printed record, and is as follows:

> "That on the 4th day of January, 1900, judgment was rendered against him (plaintiff in error)

in the above entitled cause in the Supreme Court of the State of Nebraska, which judgment is final and the Court rendering the same is the highest Court in said State in which a decision of said cause can be had.

"That in the rendition of said judgment by the said Court there was drawn in question the construction of the Statutes of the United States with reference to the lands of the Pawnee Indian reservation located in the State of Nebraska, and the act of Congress authorizing the admission of the State of Nebraska into the Union passed April 19, 1864, and found on page 47 of 13 U. S. Statutes at Large, and the decision of said Supreme Court was against your petitioner, on such construction.

"The said decision was necessary to the judgment given by the said Supreme Court and without such decision and construction the said judgment could not have been given."

THE FACTS.

At no time in the progress of this case has there been any dispute as to the facts. The sole question is one of law.

JURISDICTION OF THIS COURT

The statutes of the State of Nebraska make the opinion of the Supreme Court of the state a part of the record of a case pending before such court. Section 18, Chapter 19, entitled "Supreme Court" of the Compiled Statutes of the State of Nebraska, 1901, is as follows:

"The opinion of the Court on all questions brought before them, as well as such motions, collateral questions, and points of practice as they may think of sufficient importance, shall be reduced to writing, filed with and recorded by the

clerk of the court. All dissenting opinions must be written, filed and recorded in the same manner."

Section 594 of the Code of Civil Procedure of the State of Nebrsaka provides as follows:

"It shall be the duty of the judges of the Supreme Court to prepare and file their opinion in every case as brought before them, within sixty days after the decision of the same, and no mandate shall be sent to the court below until the opinion provided for by this section has been filed."

The construction of Section 12 of the Enabling Act, or the Federal Statutes with reference to the lands of the Pawnee Indian Reservation, as sustaining or defeating plaintiff's cause of action in Nebraska, was not raised by specific allusion in the pleadings, but it can fairly be inferred that the question was discussed and presented to the Court by the briefs and arguments of counsel, which are not made a part of the record. So far as the record is concerned, the first appeal made to these congressional acts, as defeating the plaintiff's right of recovery, is found in the first opinion of the State Supreme Court filed October 5th, 1898, page 7 of record, pg. 4 of printed record, where it is held that plaintiff 's right of recovery is defeated solely upon the construction given to these congressional acts.

The 2nd and 8th paragraphs of the motion for rehearing filed by Kennard October 29, 1898, and found on page 14 of record, page 8 of printed record, are as follows:

"2. The Court erred in holding that the Pawnee Indian Reservation lands, concerning which defendant in error performed the services for plaintiff in error, were public lands."

"8. The defendant in error contends the law should be

that the Pawnee Indian Reservation lands involved in this controversy, never were public lands, and were never owned by the United States and that the United States never had any interest in said lands after September 4th, 1857, except as trustee for the Indians."

This motion for rehearing was granted, a rehearing had, and the subsequent and last opinion of the court was filed February 9, 1899, page 19 of record. page 11 of printed record, and which has been heretofore set forth in full. In this opinion the sole and only question discussed and decided was the status of the Pawnee reservation lands in Nebraska under the act of Congress, and whether or not they were *public lands* within the meaning of the 12th section of the Enabling Act. The right of plaintiff's recovery was defeated solely by the construction that the Court placed upon these congressional acts. The question was necessarily involved in the case and the case could not have been determined adversely to plaintiff without deciding this question. It is well settled that if a federal question appears in the record, and was decided, or such decision as necessarily involved in the case, and the case could not have been determined without deciding such question, the case comes within the provision of the third class mentioned in section 709 of the U. S. Revised Statutes and this Court has jurisdiction to review the action of the State Court.

> Columbia Water Power Co. v. Columbia Street Ry. Co., 177 U. S. 475 (19 Sup. Ct. Rep. 247) and cases cited in the opinion.

CONSTRUCTION OF THE TERM "PUBLIC LANDS" IN THE ENABLING ACT AS APPLIED TO LANDS OF PAWNEE INDIAN RESERVATION.

The treaty with the Pawnee Indians, creating the Indian reservation in the State of Nebraska, is found in 11 U.

S. Statutes at Large 729. It provides for the transfer of all right, title and interest theretofore possessed by the Indians in all lands in the United States except the reservation thirty miles by fifteen miles in extent, which is specifically reserved for their use, and for their homes; provides for the payment by the government to the Indians the sum of $40,000 per annum for a period of five years, the establishment of schools, and supply to the Indians blacksmith, gunsmith, and tinsmith tools, farming utensils and stock, the erection of grist and lumber mills, dwelling houses, and keeping the same in repair; provides for the permissible occupancy of the reservation by the government for the purpose of forts, military posts and roads; provides that the Indians shall not alienate any part of said reservation, except to the United States; but if they think proper to do so, they may divide said lands among themselves, giving to each person or each head of a family, a farm subject to their tribual regulations. This treaty was approved by the Senate March 31st, 1858. A subsequent treaty was made with the Indians April 10, 1876, found in 19 U. S. Statutes at Large 28, wherein it was provided that with the consent and concurrence of the Pawnee tribe of Indians expressed in open council in the usual manner, the Secretary of the Interior was authorized to make sale of the lands of the reservation, remove the Indians to another reservation in Indian Territory, and the proceeds of such sale, after reimbursing the government for all expenses incurred in surveying the lands, making sale, purchase of another reservation, and removal of the Indians thereto, were to be placed to the credit of said Indians on the books of the Treasury of the United States, and bear interest at the rate not to exceed five per centum per annum, payable semi-annually, except such portions as may be found necessary to be expended for the immediate use of the Indians, for subsistence or other beneficial objects.

The contention of the plaintiff in error is, that by virtue of these treaties the lands of this reservation were severed from the public domain, and were no more "public lands" within the meaning of the term as used in the Enabling Act.

Referring to treaties with Indians this court has said:

"A treaty is the supreme law of the land. Courts cannot go behind it for the purpose of annulling its effect and operation and they should be liberally construed."

Fellows v. Blacksmith, 19 How. 366;
United States v. Lariviere, 53 U. S. 188;
United States v. New York Indians, 173 U. S. 464;
Ward v. Race Horse, 163 U. S. 504.

Whenever a tract of land is legally appropriated to any purpose, it is thereby severed from the mass of public lands, so that no subsequent law or proclamation or sale will be construed to embrace it.

Wilcox v. Jackson, 13 Pet. 498;
Polk v. Wendall, 9 Cranch 87;
Vincennes Uni. v. Indians, 14 Howard, 268;
Cherokee Nation v. Georgia, 5 Pet. 1;
United States v. Southern Pac., 146 U. S. 570;
Railroad Co v. Dunmeyer, 113 U. S. 629;
St. Paul v Phelps, 137 U. S., 528
Northern Pacific v. Musser, 168 U. S. 604.

This principal applies with particular force to Indian reservations, and as to all claimants, aside from the United States, the Indians are regarded as owners.

Atlantic v. Mingus, 165 U. S. 413;
United States v. Payne, 2 McCrary 303;

Dubuque & Sioux R. R. v. Desmoines Valley R. R., 109 U. S. 329;

Newhall v. Sanger, 92 U. S. 761;

Leavenworth v. United States, 92 U. S. 733;

Doolan v. Carr, 125 U. S. 625.

A reservation of lands to Indians, unaccompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple, and the treaty by which such reservation is made must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would be naturally understood by the Indians, and no specific words of grant are necessary.

Jones v. Meehan, 175 U. S. 1, (20 Sup. Ct. Rep. 1).

Crews v. Burcham, 1 Black 352;

United States v. New York Indians, 173 U. S. 464;

New York Indians v. United States, 170 U. S. 1;

United States v. Old Settlers, 148 U. S. 427.

A restricted reservation to Indians conveys an equitable title.

Lomax v. Pickering, 173 U. S. 26, (19 Sup. Ct. Rep. 416).

"The words public lands used in our legislation mean such as are subject to sale or other disposal under general laws."

Newhall v. Sanger, 92 U. S. 761;

Mann v. Tacoma, 153 U. S. 273, (14 Sup. Ct. Rep. 820).

From the authorities above cited the plaintiff in error contends that it clearly appears that by the original treaty

with the Pawnee Indians it was conclusively intended by the general government to convey the Pawnee Reservation to the Indians, and that no subsequent grant of the lands included in the reservation, or of any interest therein, could be made by the government to any other party, including the State of Nebraska, and that the construction of the provision in the Enabling Act giving to the state five per cent. of the proceeds of the sale of these lands, would be in derogation of the treaty and would be a breach of good faith with the Indians; that these lands were not public lands within the meaning of the Enabling Act.

Whether or not the United States should in equity indemnify the state to the extent of five per cent. of the value of these lands, is another question and not for the consideration of the Court.

THOMAS P. KENNARD,
BY A. S. TIBBETS,
His Attorney.

No. 261.

Supreme Court U. S.
FILED
MAY 16 1902
CLERK.

Kensard Plff. in Error
vs.
State of Nebraska

Filed May 16, 1902.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 261.

THOMAS P KENNARD,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

A. S. TIBBETS
AND T. S. ALLEN,
Attorneys for Plaintiff in error.
F. N. PROUT, ATTORNEY GENERAL,
NORRIS BROWN, DEPUTY,
Attorneys for Defendant in Error.

GIBBS-BROOKFIELD PRINTING CO., OMAHA

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ARGUMENT.

In the brief filed in this cause by the defendant in error it is contended that the money paid by the government to the State of Nebraska allowed upon the Pawnee Indian Reservation was not obtained from the government and paid to

the State through the efforts of the plaintiff in error. (Page 5 of brief).

The citation of the record made for the purpose of sustaining this view fails in its object. An examination of the record cited, and Mr. Kennard's testimony—pages 33 to 38 inclusive, printed record, and letter of U. S. Commissioner page 48 printed record, shows conclusively that this money $43,807.42 was obtained for the State directly through the efforts of Mr. Kennard. Furthermore it is shown by the record (pages 38, 39, 51, 52, 59, 60 printed record) that if the State had received 5 per cent of the sales of all the lands of the Pawnee Reservation it would have received the sum of $43,807.42 instead of the sum of $27,043.99; that the failure of the State to receive the remainder of the money claimed to be due was owing to the fact that the Interior Department after Sept. 11, 1886, reversed the decision of the department, which was obtained by Mr. Kennard January 14, 1881, and subsequently refused to pay to the State any more money under such decision.

The last payment made to the State under the decision obtained by Mr. Kennard was September 11, 1886. If the learned counsel for defendant in error are correct in their contention, then in the natural and easy course of events the government should have paid to the state upon account of the Pawnee lands, without the intervention or assistance of any financial agent, the further sum of $16,763.43. If this balance be plainly due to the State of Nebraska, then the legal representatives of the State have neglected a very easy task that has been before them for several years, and by their neglect of performance the Federal Government has, for several years, retained this balance that properly belongs to the State.

This contention of counsel for defendant in error is made in this court for the first time. The record of the proceed-

ings in the State Court fail to show that it was at any time contended by the State, that the money paid to the State on account of the Pawnee Reservation lands was not obtained through the efforts of Mr. Kennard. On the contrary the record shows, that at all times during the course of the proceedings in the State Courts, this question was conceded in favor of Mr. Kennard. The opinion of the State Supreme Court (page 12 printed record) states, "Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the State of Nebraska in the sum of five per centum of the proceeds of the sale of the Pawnee Indian Reservation lands made by the United States subsequent to the admission of the State into the Union; and in pursuance of this decision of the Secretary of the Interior the United States paid into the treasury of the State $27,000.00."

Recognizing the efforts of Mr. Kennard, and their beneficent results, the State Courts deny his right of recovery of compensation for his services, not upon the ground that he had not earned the amount he claimed, but upon the ground that the money he obtained for the State arose from the sale of PUBLIC LANDS; that the proviso at the conclusion of the act of the legislature authorizing his appointment, "that the foregoing shall in no wise apply to the cash school fund accruing to the State," excluded his employment for this particular purpose, and the question was reduced to whether or not the Pawnee Indian Reservation lands were public lands.

Counsel for Mr. Kennard contend that the object of the resolution of the legislature, authorizing his appointment, was to employ an agent to prosecute the claims of the State for compensation as to all lands named in the resolution that had been placed without the public domain otherwise

than by sale and homestead and similar entries, and that his contract would apply to any lands where the right of the State to its percentage had been denied. The resolution of the legislature describes "Indian Reservations" as a portion of the public domain that had been alienated, and concerning which the employment of a special agent was necessary. Unless the Pawnee Indian Reservation was not an "Indian Reservation" and was PUBLIC LANDS the right of plaintiff in error to recover is plain.

Mr. Kennard in prosecuting the claims of the State, based these claims upon equitable grounds; that the government by alienating the lands, otherwise than by sale, had thereby deprived the State of its five per centum of the proceeds of the sale and should in equity compensate the State for its loss. The amount of compensation was contended to be five per cent of the value of the lands, which value as to the Pawnee Reservation lands should be fixed at the amount actually realized from the sale of the lands, when the same were sold on behalf of the Indians. That the Secretary of the Interior based his allowance as to the Pawnee lands upon legal rather than equitable grounds, could in no way defeat Mr. Kennard's right of compensation.

Neither could the State assume, that, as the Secretary decided that the lands in dispute were public lands, therefore it was relieved from its obligation to pay its attorney for his services. The reasons given by the Secretary for the allowance of the claim could in no wise determine the rights of the parties to this action.

The question to be determined by this court, and which gives the right of a writ of error, is entirely a legal one, and is whether or not, as construed by the Acts of Congress, the Pawnee Indian Reservation lands were public lands.

INDIAN RESERVATIONS AS PUBLIC LANDS.

The conclusions in the opinion of the Supreme Court

of the State of Nebraska, and the brief of the Counsel for Defendant in Error, are based upon the decision in the case of Buttz v. Northern Pacific Railroad Company, 119 U. S. 55, and which is claimed to be decisive of the question of whether or not Indian Reservations are Public Lands within the meaning of the legislative acts of Congress. It is claimed that this case overrules the case of Newhall v. Sawyer, 92 U. S. 763, and Wirth v. Branson, 98 U. S. 118. An examination of the case of Buttz v. Northern Pacific Railroad Company shows that the controversy was between parties who derived their title from a common source, and neither party to the litigation was in a position to deny the title of the United States to the land in controversy. Furthermore, the land in controversy was not located upon any Indian Reservation, and no question of title of any Indian Reservation, or the construction of any treaty with the Indians where any lands were set aside as a reservation arose. The land in controversy in that case was located in what is termed by the courts as "Indian Country," it being land in territory that was occupied by the Indians in their wild and native state, and the only title held by the Indians was such title as has been recognized by the government to be held by all peaceably inclined Indians to lands in their possession and occupancy and used for the purposes of chase, and the production of such sustenance as was employed by them in their native or savage condition.

It has always been recognized by the government that peaceable tribes of Indians who held possession and occupancy of certain lands had a right or interest in such lands so far as they made use of the same in their native state and condition. The policy of the United States with reference to the Indian tribes and their rights to the lands found in their possession and occupancy, has been to recognize the fact that equity, justice and fair treatment demanded that

the use of said lands by such tribes in their savage state constituted in a certain sense a property right, of which they should not be divested without just compensation. This interest has been divested by a series of treaties with the different friendly tribes in which these tribes have been regarded as quasi foreign nations.

Johnson v. McIntosh, 8 Wheat. 574;
The Cherokee Tobacco, 11 Wall. 616.

The compensation received by the Indians, provided for in these treaties, has been in the way of cash payments, provisions for the education and civilization of the tribes treated with, and the setting apart of reservations for such tribes, in which the government relinquished to such tribes the fee title of such reservations for all civilized purposes and which included all the right, title and interest that the government had to convey in such lands, and thereafter the United States had no interest in such reservations, except such interest as was specifically reserved in the treaties.

The ownership of the United States was considered to have been acquired by the right of discovery, and included the full right and title in fee simple for all civilized purposes, subject only to such usage as the savage or Indian tribes had previously put upon such lands. The dominion of the discoverer was considered complete, except as against such rights of the In ians, and no one except the sovereign or discoverer could acquire any further or greater right to any portion of the country, than that originally held by the Indians.

This theory and the application of it was to only such Indian tribes as were friendly, and it was not applicable in cases of conquest. The title by conquest as against the Indians, was acquired and maintained by force, and the conquerer dictated to the subdued Indian tribes the terms of

peace and did not recognize the right of the conquered Indians to any possession or occupancy of any lands.

The leading case upon the question of the extent of the original title of the Indians and the title acquired by the discoverer or conquerer, is Johnson v. McIntosh, 8 Wheat. 543, where the question is elaborately and very ably discussed by Chief Justice Marshall, since which time, 1823, the views expressed in that opinion have been the law of the land.

The case of Buttz v. the Northern Pacific Railroad Company is in strict accordance with the opinion of Justice Marshall, and refers only to the original right of occupancy by the Indians. The court in its opinion states, (quoting from 13 Pet. 201):

"The ultimate fee, encumbered with the Indian right of occupancy, was in the crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unincumbered fee."

The court further states,

"Nearly all the lands in the territory of Dakota, and indeed, a large, if not the greater, portion of the land along the entire route to Puget Sound on which the road of the company was to be constructed was subject to this right of occupancy by the Indians. With knowledge of their title, and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extend the title."

It will clearly be seen that the title of the Indians referred to in the Buttz case was simply the title arising from the occupancy by the Indians, and not the title that was trans-

ferred to the Indians for the purposes of civilization by way of an Indian reservation.

In the case at bar the treaty with the Pawnee Indians was fully as broad as other treaties that have been construed by the courts as conveying to the Indians absolute ownership. The terms of the treaty provided for the civilization and education of the Indians and the use of the reservation lands for civilized purposes, including tillage and general cultivation of the soil. The grant to the Indians would in no way be defeated by the fact that the grant was made to the tribe as a community and not in severalty. The ownership would be as complete in the community as it would in severalty. These lands were never subsequently opened for settlement, except to purchasers who bought the lands and paid the purchase money to the government as trustee for the Indians. The United States after the treaty of 1857 retained no interest in this reservation except for the special purposes mentioned in the treaty, such reservation being the use of the land for the purpose of forts, military posts and roads. Without violating the terms of the treaty with the Pawnees the government could not afterwards assert any ownership in the reservation lands except for military purposes, and it could not subsequently convey to the State of Nebraska any interest in such lands, and could not return them to the public domain without the consent of the Indians, and such Indian reservation was consequently not public lands.

In further support of our contention we cite California and Oregon Land Co. v. Worden, 85 Fed. 94; Martin v. Lessees of Waddell, 16 Peters 367. All of which we respectfully submit.

T. S. ALLEN,
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Attorneys for Plaintiff in Error.

No. 261.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

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No. 261.

Filed Mar. 31, 1902.

THOMAS P. KENNARD,
Plaintiff in Error,

v.

THE STATE OF NEBRASKA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF THE STATE.

A. S. TIBBETS,
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F. N. PROUT, *Attorney General,*
NORRIS BROWN, *Deputy,*
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

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ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

A. S. TIBBETTS, *Attorney for Plaintiff in Error.*

F. N. PROUT, *Attorney General,* NORRIS BROWN, *Deputy, Attorneys for Defendant in Error.*

BRIEF OF THE STATE.

Statement.

This is a proceeding in error, prosecuted by plaintiff in error, from a judgment rendered against him by the supreme court of the state of Nebraska. The controversy between the parties to this cause arose over a certain contract entered into between Kennard and the governor of the state. The authority of the governor to make the contract is based on a resolution passed by the legislature

of the State of Nebraska in 1873. The resolution is as follows:

"Be it resolved by the Legislature of the State of Nebraska:

"That the governor be and he hereby is authorized and empowered to appoint an agent or agents, in behalf of the state, to prosecute to final decision before congress, or in the courts, the claim of this state for the five per cent. due to the same from the United States, upon the land of this state disposed of by Indian reservations, and by the location of military land warrants and land scrip issued for military service in the wars of the United States, and for agricultural college scrip, and railroad lands; and,

"Whereas, the government of the United States has allowed various states large amounts of swamp and overflowed lands lying within their borders; and,

"Whereas, no such allowance of swamp and overflowed land has ever been received by this state for the large area of land lying within its limits subject to overflow; now, therefore,

"Be it resolved by the Senate and House of Representatives of the State of Nebraska:

"That the governor is hereby authorized and empowered to appoint a competent and reliable agent, or agents, as provided in section one of this act; and that said agent or agents shall receive such compensation from said lands, or money, as may be agreed upon by said agent or agents, and the governor, conditioned that the state shall be put to no expense whatever, unless said agent or agents shall be successful, in whole or in part, in securing the aforementioned claims: Provided, that the foregoing shall, in *nowise*, apply to the five per cent. cash school fund accruing to the state." Gen. Stats. Neb. 1873, p. 869.

The contract is as follows:

"STATE OF NEBRASKA, EXECUTIVE DEPARTMENT.
LINCOLN, October 15, 1874.

"That whereas the legislature of the State of Nebraska, passed a joint resolution relative to the appointment of an agent or agents for the collection of the amount due from the United States to the State of Nebraska, on ac-

count of lands in this State disposed of by the Indian reservations, military land warrants and land scrip issued for military services in the wars of the United States for agriculture college scrip and for the recovery of swamp and overflow lands due the state approved February 8, 1873, a certified copy of which is hereto attached and made a part of this agreement;

"Now therefore in pursuance of the object and intent of said joint resolution and by the power and authority vested in me by the same, I, Robert W. Furnas, governor of the State of Nebraska, do by these presents appoint an agent, Thomas P. Kennard and with him stipulate as follows: In consideration that the said Thomas P. Kennard shall diligently and to the best of his ability prosecute and collect the claims specified in said joint resolution and upon the terms therein specified and contemplated, he, the said Thomas P. Kennard, shall have and be entitled to receive for his services in the premises fifty per cent. of the amount so collected, the remaining fifty per cent. of the amount so collected to be paid over to the said Robert W. Furnas governor of Nebraska or his successor in office for the use and benefit of the State of Nebraska, as by law in such cases made and provided. Provided that it is hereby distinctly understood and agreed that no charge shall be made to the state for any expense or services of whatever kind or nature in case of failure to collect money or lands contemplated in the joint resolution authorizing this contract; to all of which the contracting parties agree as witness their respective signatures the day and year above written." Printed Record p. 19.

Argument.

There was practically no dispute as to the facts on the trial of this case, as shown by the record. The final adjudication of the rights of the parties by the supreme court of the state of Nebraska, as shown by the opinion of the court was based solely on the interpretation to be gives section 12 of the Enabling Act passed by congress, which is as follows:

"And be it further enacted that five percentum of the

proceeds of the sales of all public lands lying within said state, which have been or shall be sold by the United States prior or subsequent to the admission of said state into the union after deducting all expenses incident to the same, shall be paid to the said state for the support of the common schools." 13 U. S. Stats. at Large, p. 49.

The lands in the Indian reservation for which the government paid the five percentum named in the section above quoted and one-half of which the plaintiff in error seeks to recover from the state for services under his contract were not opened by the government for public purchase until 1878. At the time the resolution was passed they were known as the Pawnee Indian Reservation and occupied by the Indians. From the resolution of the legislature in 1873 it is apparent that the state intended to claim a share of these lands under the Enabling Act even though they were being occupied by the Indians. Kennard's employment was for the purpose of prosecuting that claim before the federal department and courts. The federal government was of the opinion that the state had no right, or title, or interest in any of the lands in the Indian reservation, up to the time the reservation was opened for public occupancy and the rights of the Indians were terminated. In 1878 the federal government opened the reservation to the public for settlement, the Indians having abandoned the lands. The moneys received by the state from the government, and which are the subject of this controversy, are the percentum arising from the sale of those lands to the public since 1878. There never was any contention between the state and the government about this money belonging to the state. There was never any need of an agent to prosecute this claim, and it is obvious from the express terms of the contract itself that Kennard was not employed for the purpose of collecting these funds from the federal government, about which there was no dispute. His employment was to recover

for the state and its use moneys and lands due from other sources, and for these lands while still an Indian reservation. Such is the express provision of the contract, for it is stipulated therein "that the foregoing shall in nowise apply to the five percentum cash school fund accruing to the state"; and such must have been the understanding of Kennard himself, for by his own testimony it appears that he first filed a claim in behalf of the state for five per cent. of the value of these lands at a price fixed by himself. In other words, he was undertaking to recover five per cent. of their value while they were still being occupied by the Indians and before they were sold by the government; but the moment the lands ceased to be an Indian reservation by act of congress and were abandoned by the Indians and were opened to public purchase and *were sold* by the government, then they were beyond and without the scope of his employment and were within the exception contained in his contract which expressly forbade him receiving any commission for the collection of the five percentum cash school fund.

The testimony of Mr. Kennard himself was to the effect that the claim as filed and presented by him at Washington, while the Indians were occupying these lands, was rejected by the government and that the five percentum afterwards paid directly to the state was paid voluntarily by the government after the Indians had left the reservation and after the lands had been sold subsequent to January 1, 1878. (Pages 39, 40, 41 and 42 of printed record.)

This is corroborated by plaintiff's exhibit 1, being a statement from the land department. (Pages 45 and 46 of printed record.)

Plaintiff's exhibit 4 on page 48 of the printed record discloses that the government recognized these lands as public lands and expressly treated them as within section 12 of the enabling act, and on account of that fact acknowledged itself indebted to the state of Nebraska to the ex-

tent of five percentum of the proceeds of their sale, under the terms thereof for the use of the schools of said state.

All lands owned by the general government and subject to sale or other disposal under general laws are public lands.

The controlling question in this case is, were the lands known as the Pawnee Indian reservation at the time of Nebraska's admission into the union public lands within the meaning of section 12 of the Enabling Act?

We contend they were, for the reason that the fee title to said lands was in the United States and they were subject to sale or other disposal. "The words 'public land' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." (*Newhall v. Sawyer*, 92 U. S., 763; *Wirth v. Branson*, 98 U. S., 118.)

The Pawnee Indians occupied the lands in question but they had no title thereto, either legal or equitable. Their sole claim and interest in them began with their occupancy thereof and ended with their departure therefrom. It will not be disputed that by an unbroken line of decisions of this court the law is settled that the fee title remains in the United States until by express grant it is severed; a grant to use and occupy lands does not convey title. By treaty congress authorized the Pawnee Indians to ocupy said reservation but at no time did congress attempt to invest them with title.

We think that *Buttz v. Northern Pacific Railroad Co.*, 119 U. S., 55, is decisive of this case. These were the facts in that suit, briefly stated:

Congress had granted to the railway company certain lands to aid in the construction of a railroad and telegraph line from Lake Superior to the Pacific Ocean. Some of the lands were within the territory of Dakota and were a part of the reservation occupied at the time by the Sioux Indians. After the abandonment of the reservation by the Indians a citizen, with all the qualifications of a pre-

emptor, entered upon the land in dispute with the intention of securing pre-emption rights under the law, built a house thereon and occupied it. On these facts the railroad contended it became the owner in fee of the land encumbered only by the right of occupancy by the Indians at the time of the grant by congress. The pre-emptor claimed that at the time of the grant the United States not being in possession of the land was powerless to convey the fee title to the company and therefore the company was not the owner thereof; which, if true, gave him the right to obtain it by pre-emption. The supreme court held against the contention of the pre-emptor and in effect said that all Indian lands occupied in common by the Indians, whether these lands be reservation or not, are public lands, the fee-simple title to which is in the United States; that the Indian is the ward of the nation and his only interest and title to the lands of which he is in possession is the right of occupancy.

Such being the law as settled by the highest court of the land, then the judgment of the supreme court of Nebraska must be correct. The application of the rule to the facts in this case is stated so well by RAGAN, C., that we quote:

"We think, therefore, that when Nebraska was admitted into the union the lands of the "Pawnee Indian reservation" were public lands, the fee-simple title was in the United States, and the Indians had only the right of occupancy in those lands, and that an absolute grant by congress to the state of all public lands within her borders would have invested the state with the title to the lands of the 'Pawnee Indian reservation,' incumbered only with the Indians' right of occupancy. The United States then, by paying into the state treasury, at the request and solicitation of Mr. Kennard, of five per cent. of the sale of these Indian reservation lands, were simply performing the grant made by the nation to the state by section 12 of the enabling act, as by the grant the United States promised to pay to the state not only five per cent. of the proceeds of all public lands lying within the state and

which had prior to that time been sold by the United States, but also to pay to the state five per cent. of the proceeds of all public lands lying within the state which might after the date of the grant be sold by the United States. The fact that the United States sold these lands and put the money to the credit of the Pawnee Indians is not a consideration of any importance in determining whether these "Pawnee Indian reservation" lands were public lands within the meaning of the enabling act. The thing of controlling importance is that the fee-simple title to these lands was in the United States. They were, therefore, public lands, and the promise was that when sold by the owner it would pay five per cent. of the proceeds of the sale to the state." *State v. Kennard*, 57 Neb., 716.

The argument of the learned counsel for plaintiff in error, that these lands were not public lands because they were occupied by the Indians under a treaty which is the supreme law of the land, is to say that the $27,000 of which he now claims one-half, was wrongfully and unlawfully collected. For, if the United States had no title to these lands, if they belong under the treaty to the Indians, if they were not public lands, then the state of Nebraska was entitled to no per cent. of their value or of the proceeds of their sale and the government was defrauded by this collection. We very seriously question the right of recovery against the state in this suit when it is based on a theory so obnoxious to good faith and public policy. Kennard was not employed to prosecute a fraudulent claim, and yet, that is what he did if his present contention and argument be sustained.

Respectfully submitted,

THE STATE OF NEBRASKA,
By F. N. Prout, *Attorney General*.
Norris Brown, *Deputy*.

Lincoln, Nebraska, March 24, 1902.

Supreme Court of the United States.

No. 261.—October Term, 1901.

Thomas P. Kennard, Plaintiff in Error, vs. The State of Nebraska. } In error to the Supreme Court of the State of Nebraska.

[June 2, 1902.]

Mr. Justice Shiras delivered the opinion of the Court.

In May, 1897, in the District Court of Lancaster County, State of Nebraska, Thomas P. Kennard brought an action against the State of Nebraska, seeking to recover the sum of $13,521.99—being fifty per centum of a certain sum paid by the United States to the State of Nebraska, and which plaintiff alleged had been so paid by reason of his services, as a duly appointed agent of the State, in procuring the allowance of the claim of the State. The petition further stated that, in pursuance of an act of the legislature of the State, the governor had contracted with the plaintiff to promote the claim of the State, and had agreed that plaintiff was to receive fifty per centum of the amount recovered. It also alleged that by a resolution of the legislature he was authorized to prosecute his claim in the courts of the State of Nebraska.

The cause was put at issue, and came to trial, a jury being waived, and on March 11, 1898, upon the pleading and evidence, the court found for the plaintiff the sum of $13,521.99, and entered judgment accordingly. The cause was taken to the Supreme Court of Nebraska, where, on October 5, 1898, the judgment of the trial court was reversed, (*State* v. *Kennard*, 56 Neb. 254;) and again, on February 9, 1899, upon a rehearing, the same conclusion was reached. A writ of error was allowed, January 17, 1901, and the cause brought to this court.

The facts of this case appear, sufficiently for our purposes, in the following extract from the opinion of the Supreme Court of Nebraska, filed upon a rehearing of the case in that court:

"This is a rehearing of *State* v. *Kennard*, (56 Neb. 254.) By section 12 of the enabling act passed by Congress, April 19, 1864, (13 U. S. Statutes at Large, 47,) the United States donated to the State of Nebraska five per centum of the proceeds of sale of all public lands lying within the State of Nebraska which had prior to that time been sold, or which should subsequently be sold, by the United States, after deducting expenses incident to such sale. At the time the State was admitted into the Union a tribe of Indians, known as the 'Pawnees,' occupied in common a tract of

lands in this State known as the 'Pawnee Indian reservation.' After the State was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States Treasury to the credit of the Indians. By an act passed by the legislature of the State of Nebraska in February, 1873, (see General Statutes 1873, ch. 59,) it seems that the legislature was of opinion that by reason of section 12 of the enabling act the United States was indebted to it for five per cent of the value of the lands lying within the State used as Indian reservations, and five per cent of the value of all lands on which private parties had located military land warrants and land scrip issued for military service in the wars of the United States, and five per cent of the value of all such as had been donated by the United States to railroads.

"It is also recited in said act that the United States had donated to other States swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this State, and it seems to have been the opinion of the legislature that all the swamp and overflowed lands lying within the State belonging to the United States should by it be donated to the State. The act under consideration authorized the governor to employ an agent in behalf of the State, to prosecute to final decision before Congress or in the courts, the claim of the State of Nebraska against the United States for the five per cent of the value of the lands disposed of by the United States for any of the purposes already mentioned and for the purpose of procuring from the United States a donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the five per cent cash school fund which had been donated to the State by the United States by section 12 of the enabling act aforesaid. The governor of the State entered into a contract with Kennard in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the State against the nation in conformity with the act of the legislature, and that the State should pay him one-half of all moneys, except such cash school fund, he should collect for the State as such agent. Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the State of Nebraska in the sum of five per centum of the proceeds of the sale of the 'Pawnee Indian reservation' lands made by the United States subsequent to the admission of the State into the Union; and, in pursuance of this decision of the Secretary of the Interior, the United States paid into the treasury of this State $27,000. Mr. Kennard, by permission of the legislature, then brought this suit to recover one-half of that sum. He had judgment in the District Court for Lancaster County, and the State brought the same here for review, and the judgment of the District Court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the 'Pawnee Indian reservation' were public lands within the meaning of section 12 of the

enabling act, and that the only money collected by Mr. Kennard was the five per cent. of the proceeds of the sale made of these lands by the United States, and, by the terms of his contract, he was not to have any compensation for collecting these moneys."

Upon this statement of the facts, does this court have jurisdiction to review the judgment of the Supreme Court of the State of Nebraska?

There was no dispute as to the facts out of which the controversy arose. The right of the plaintiff to recover under his contract with the State is not for us to determine, unless the record discloses that he has been deprived of some title, right, privilege or immunity secured to him by the Constitution of the United States, and unless it appears that such title, right, privilege or immunity was specially set up or claimed in the State court. (*Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Water Power Co.* v. *Street Rwy. Co.*, 172 U. S. 475.)

Looking into the record, we do not find in the pleadings, or in the petition for a hearing any specific statement or claim by the plaintiff in error of any right, title, privilege or immunity secured to him by any provision of the Constitution of the United States. This, indeed, is admitted in the brief of the plaintiff in error, but it was claimed in the petition for allowance of a writ of error from this court, "that in the rendition of the judgment by the Supreme Court of the State there was drawn in question the construction of the statutes of the United States with reference to the lands of the Pawnee Indian reservation located in the State of Nebraska, and the act of Congress authorizing the admission of the State of Nebraska into the Union, passed April, 1864, (13 Stat. 97,) and that the decision of said Supreme Court was against the plaintiff in error in such construction," and that "said decision was necessary to the judgment given by the said Supreme Court, and without such decision and construction the said judgment could not have been given." And it is now contended that the plaintiff's right to recover was defeated solely by the construction the State court placed upon the Congressional acts, and that thus a Federal question appears in the record, giving this court power to review the decision of the State court.

But the validity of the acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the State court rests upon section 709 of the Revised Statutes. It has often been held that the validity of a statute or treaty of the United States is not "drawn in question." within the meaning of section 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed. (*Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Cook County* v. *Calumet & Canal Company*, 138 U. S. 635, 653; *Borgmeyer* v. *Idler*, 159 U. S. 408; *Blackburn* v. *Portland Mining Company*,

175 U. S. 571; *Florida Central Railroad Company* v. *Bell*, 176 U. S. 321, 328; *Water Power Company* v. *Street Railway Company*, 172 U. S. 488.)

The decision by the Supreme Court of the State, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the twelfth section of the enabling act, did not bring into question the validity of that section—much less was it a decision *against* its validity. As, then, the plaintiff in error specially set up or claimed no Federal right, and as the judgment of the Supreme Court of Nebraska did not impugn the validity of any stature of the United States, we find nothing on which to rest a right to review that judgment, and the writ of error is accordingly.

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.